ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-19–06 OF 2024(W)
ABU BAKAR JAIS PCA, NALLINI PATHMANATHAN AND NORDIN HASSAN FCJJ
13 AUGUST 2025

Arbitration — Award — Enforcement — Appellants converted their London arbitral award against respondent into judgment in English High Court and registered same in Malaysia under Reciprocal Enforcement of Judgments Act 1958 (' the REJA') for purpose of enforcement — Whether mode of enforcement adopted by appellants was proper — Whether appellants should have applied under Malaysian Arbitration Act 2005 ('the AA') to directly enforce arbitral award instead of converting it into English judgment — Whether respondent was not prejudiced as its right to set aside registration of the English judgment remained unaffected — Whether respondent could still challenge validity of arbitral award on grounds of jurisdiction and fraud under s 5 of the REJA

The appellants had obtained an arbitral award in London in their favour against the respondent based on two commercial contracts whose existence was denied by the respondent. Although the arbitral award had addressed the respondent's objections both on jurisdiction and merit, the respondent neither complied with the award nor applied to challenge it or set it aside. Instead of applying under the Malaysian Arbitration Act 2005 ('the AA') to directly enforce the arbitral award against the respondent, the appellants converted the award into a judgment of the English High Court ('the UK judgment') pursuant to s 66 of the UK Arbitration Act 1996 and thereafter registered the judgment in the Malaysian High Court under the Reciprocal Enforcement of Judgments Act 1958 (' the REJA') for purpose of enforcement. The respondent applied to set aside the registration, inter alia, on the ground that the UK judgment was made without jurisdiction and was obtained by fraud. Prior to the determination of the setting-aside application, the respondent applied for a trial of four issues (which had already been determined by the arbitral tribunal in London) essentially to re-establish that the arbitral award was made without jurisdiction and was obtained by fraud and therefore was invalid and unenforceable. The High Court dismissed the application for trial as an abuse of process. The Court of Appeal ('COA'), however, reversed the decision and allowed the application for trial under O 67 r 9(2) of the Rules of Court 2012. The COA held, inter alia, that: (a) when it was alleged that the arbitral award was invalid for lack of jurisdiction and fraud, the court could not brush the allegations aside but had to hear and determine them afresh; and (b) the

appellants had employed the wrong mode to enforce the arbitral award as s 8 of the AA required such application for enforcement to be made exclusively under the AA and not by way of any other mode. The instant appeal was against the COA's decision.

Held, unanimously allowing the appeal and setting aside the COA's decision:

(1) The arbitral tribunal in London had considered in detail each of the issues that the respondent sought to have heard afresh by way of a full de novo hearing in the enforcing court under theREJA. The arbitral tribunal had given reasons as to why the respondent's complaints were dismissed on the merits. In the circumstances, the COA's decision to allow the respondent's application for trial of the issues under O 67 r 9(2) of the Rules of Court 2012 was set aside and the application to set aside the registration of the UK judgment under the REJA had to proceed without any such trial (see paras 293 & 320).

(2) Section 2 of the REJA defined 'judgment' as including an arbitral award which had been registered as a judgment in the place where the arbitral award was made. This meant that foreign arbitral awards through their confirmation judgments were capable of being recognised and enforced in Malaysia under the REJA on the principles of reciprocity and comity between nations (see paras 69, 97–98 & 103).

(3) REJA and the AA were two separate and discrete modes or avenues for the registration and enforcement of foreign arbitral awards — the REJA, through the recognition of confirmation judgments premised on an arbitral award in respect of a relatively few and select States as expressly provided for in the Act, whilst the AA provided a direct route for the registration and enforcement of foreign arbitral awards generally (see para 109).

(4) As the REJA and the AA were separate and distinct statutes providing for different modes of enforcement, they were not in conflict or inconsistent with one another to warrant either one being made subject to the other. Hence, the court hearing an application under the REJA could not exercise the powers and jurisdiction of a court hearing a matter under ss 37 to 39 of the AA and the 'passive remedy' recognised and used in the setting aside of arbitral awards under the AA could not be read into the REJA as the REJA contained its own provisions allowing for the non-registration of a judgment including a confirmation judgment (see paras 156–157 & 321).

(5) As the REJA was premised on a special relationship of reciprocity between Malaysia and specified States, it was not plausible to use the general provisions of another distinct statute, such as the AA, to preclude or prevent a statutory mode of enforcement that had been specifically

enacted by Parliament. Contrary to the COA's finding, s 8 of the AA did not displace or impliedly repeal parts of the REJA or relegate the AA as the sole means of enforcing arbitral awards. Section 8 only provided that 'No court shall intervene in matters governed by this Act'. The matters governed by the AA concerned domestic and international commercial arbitration and not the registration of judgments, including confirmation judgments in respect of arbitral awards, which were matters governed by the REJA (see paras 133, 135, 139–142).

(6) Section 5 of the REJA allowed the judgment debtor to set aside the registration of a foreign judgment if any one of the six separate issues stipulated therein was made out including where the judgment had been obtained without jurisdiction or by fraud. A real adjudication of the six matters set out in s 5 of the REJA, in the case of a confirmation judgment premised on a foreign arbitral award, should examine or review those issues in relation to the arbitral award and not be confined solely to the confirmation judgment. It was thus open to the respondent to raise the grounds set out in s 5 of the REJA to challenge the arbitral award that had taken the form of the confirmation judgment (see paras 179–180 & 187).

[Bahasa Malaysia summary

Perayu-perayu telah memperoleh suatu award timbang tara di London yang memihak kepada mereka terhadap responden berdasarkan dua kontrak komersial yang kewujudannya telah dinafikan oleh responden. Walaupun award timbang tara tersebut telah menangani bantahan responden berhubung bidang kuasa dan merit, responden tidak mematuhi award tersebut dan juga tidak membuat permohonan untuk mencabarnya atau membatalkannya. Sebaliknya, daripada memohon di bawah Akta Timbang Tara 2005 ('ATT') Malaysia untuk menguatkuasakan secara langsung anugerah timbang tara tersebut terhadap responden, perayu-perayu telah menukar award itu kepada satu penghakiman Mahkamah Tinggi England ('penghakiman UK') menurut s 66 Akta Timbang Tara UK 1996 dan seterusnya mendaftarkan penghakiman tersebut di Mahkamah Tinggi Malaysia di bawah Akta Penguatkuasaan Penghakiman Bersaling 1958 ('APPB') bagi tujuan penguatkuasaan. Responden telah memohon untuk mengenepikan pendaftaran tersebut antara lain atas alasan bahawa penghakiman UK dibuat di luar bidang kuasa dan telah diperoleh secara penipuan. Sebelum penentuan permohonan untuk mengenepikan award itu, responden telah memohon untuk satu perbicaraan terhadap empat isu (yang telah pun ditentukan oleh tribunal timbang tara di London) pada asasnya untuk menghujahkan semula bahawa award timbang tara tersebut dibuat di luar bidang kuasa dan diperoleh melalui penipuan dan oleh itu tidak sah serta tidak boleh dikuatkuasakan. Mahkamah Tinggi telah menolak permohonan bagi perbicaraan tersebut sebagai satu penyalahgunaan proses. Namun begitu, Mahkamah Rayuan ('MR') telah membatalkan

keputusan itu dan membenarkan permohonan bagi perbicaraan di bawah A 67 k 9(2) Kaedah-Kaedah Mahkamah 2012. MR telah memutuskan, antara lain, bahawa: (a) apabila dikatakan bahawa award timbang tara itu tidak sah kerana ketiadaan bidang kuasa dan penipuan, mahkamah tidak boleh mengenepikan dakwaan tersebut tetapi hendaklah mendengar dan menentukannya semula; dan (b) perayu-perayu telah menggunakan kaedah yang salah untuk menguatkuasakan award timbang tara tersebut kerana s 8 ATT memperuntukkan bahawa permohonan bagi penguatkuasaan hendaklah dibuat secara eksklusif di bawah ATT dan bukan melalui mana-mana kaedah lain. Rayuan ini adalah terhadap keputusan MR tersebut.

Diputuskan, sebulat suara membenarkan rayuan dan mengenepikan keputusan MR:

(1) Tribunal timbang tara di London telah meneliti secara terperinci setiap isu yang ingin didengar semula oleh responden melalui perbicaraan penuh de novo di mahkamah penguatkuasaan di bawah Akta Penguatkuasaan Penghakiman Bersaling 1958 ('APPB'). Tribunal timbang tara tersebut telah memberikan alasan mengapa tuntutan responden telah ditolak atas merit. Dalam keadaan tersebut, keputusan MR untuk membenarkan Permohonan Perbicaraan untuk isu-isu oleh responden di bawah A 67 k 9(2) Kaedah-Kaedah Mahkamah 2012 telah diketepikan dan permohonan untuk mengetepikan pendaftaran penghakiman UK di bawah APPB hendaklah diteruskan tanpa sebarang perbicaraan sedemikian (lihat perenggan 293 & 320).

(2) Seksyen 2 APPB mentakrifkan 'penghakiman' sebagai termasuk suatu award timbang tara yang telah didaftarkan sebagai penghakiman di tempat di mana award timbang tara itu dibuat. Ini bermaksud bahawa award timbang tara asing melalui pengesahan penghakiman boleh diiktiraf dan dikuatkuasakan di Malaysia di bawah APPB berdasarkan prinsip timbal balik dan hubungan antara negara (lihat perenggan 69, 97–98 & 103).

(3) APPB dan ATT adalah dua kaedah atau saluran yang berasingan dan tersendiri bagi pendaftaran serta penguatkuasaan award timbang tara asing — APPB, melalui pengiktirafan terhadap pengesahan penghakiman yang berasaskan award timbang tara mengenai beberapa buah Negara terpilih sebagaimana yang diperuntukkan secara nyata dalam Akta tersebut, manakala ATT menyediakan laluan terus bagi pendaftaran dan penguatkuasaan award timbang tara asing secara umum (lihat perenggan 109).

(4) Oleh kerana APPB dan ATT merupakan dua undang-undang berasingan dan berlainan yang memperuntukkan kaedah penguatkuasaan yang berbeza, kedua-duanya tidak bertentangan atau tidak selaras antara satu sama lain sehingga memerlukan salah satu tertakluk kepada yang lain.

Oleh itu, Mahkamah yang mendengar sesuatu permohonan di bawah APPB tidak boleh melaksanakan kuasa dan bidang kuasa mahkamah yang mendengar perkara di bawah ss 37 hingga 39 ATT, dan 'remedi pasif' yang diiktiraf serta digunakan dalam pembatalan award timbang tara di bawah ATT tidak boleh dibaca masuk ke dalam APPB kerana APPB mengandungi peruntukannya sendiri yang membenarkan penolakan pendaftaran sesuatu penghakiman termasuk pengesahan penghakiman (lihat perenggan 156–157 & 321).

(5) Memandangkan APPB berasaskan hubungan khas timbal balik antara Malaysia dan Negara-Negara tertentu, adalah tidak munasabah untuk menggunakan peruntukan am daripada suatu undang-undang lain yang berasingan seperti ATT bagi menolak atau menghalang kaedah penguatkuasaan statutori yang telah digubal secara khusus oleh Parlimen. Bertentangan dengan dapatan MR, s 8 ATT tidak mengenepikan atau secara tersirat memansuhkan mana-mana bahagian APPB dan tidak juga menjadikan ATT sebagai satu-satunya cara untuk menguatkuasakan award timbang tara. Seksyen 8 hanya memperuntukkan bahawa 'Tiada mahkamah boleh campur tangan dalam perkara yang dikawal oleh Akta ini'. Perkara-perkara yang ditadbir oleh ATT adalah mengenai timbang tara komersial domestik dan antarabangsa dan bukannya mengenai pendaftaran penghakiman, termasuk penghakiman pengesahan berkenaan award timbang tara, yang merupakan perkara yang ditadbir oleh APPB (lihat perenggan 133, 135 & 139–142).

(6) Seksyen 5 APPB membenarkan penghutang penghakiman untuk mengenepikan pendaftaran sesuatu penghakiman asing jika mana-mana daripada enam perkara berasingan yang diperuntukkan di dalamnya dibuktikan, termasuklah keadaan di mana penghakiman tersebut diperoleh di luar bidang kuasa atau melalui penipuan. Penentuan sebenar terhadap enam perkara yang dinyatakan dalam s 5 APPB, dalam kes penghakiman pengesahan yang berasaskan award timbang tara asing, hendaklah meneliti atau menilai semula isu-isu tersebut berhubung dengan award timbang tara itu sendiri dan tidak dihadkan semata-mata kepada pengesahan penghakiman. Oleh itu, responden boleh mengemukakan alasan-alasan yang dinyatakan dalam s 5 APPB untuk mencabar award timbang tara yang merupakan pengesahan penghakiman tersebut (lihat perenggan 179–180 & 187).]

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Arbitration Act 1889 [UK]
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Arbitration Act 1996 [UK] ss 66, 66(1), (2), 67, 73, 101
Arbitration Act 1996 [NZ]
Arbitration Act 2005 s 8, 37, 37(2)(a), 38, 39
Arbitration Ordinance 1890 (repealed by Arbitration Ordinance 1950)
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Arbitration and Conciliation Act 1996 [IN] s 48(2)
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Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (repealed by Arbitration Act 2005)
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Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (repealed by Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019) [SG]
Reciprocal Enforcement of Judgments Act 1958 ss 2, 3(2), 5, 5(1)(a)(ii), (1)(a)(iv), First Schedule
Uniform Foreign-Country Money Judgments Recognition Act [US] s 4

Appeal from: *Tumpuan Megah Development Sdn Bhd v ING Bank NV & Anor* [2024] MLJU 44 (Court of Appeal, Putrajaya)

Sharon Chong (with Muhammad Suhaib Ibrahim and Akhmal Amaluddin) (Skrine) for the appellants.

Nahendran Navaratnam (with Steven Thiru, Wong Wye Wah, Derrick Chan, Jeremiah Rais, Brandon Toh and Ananthan Moorthi) (CK Chan Law Practice) for the respondent.

Jason Chuah (Dean of Faculty of Law, University Malaya) amicus curiae for the Faculty of Law University Malaya.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] Arbitration allows parties to an international commercial partnership to resolve their disputes according to the agreement they undertook at the outset of their relationship. It envisages familiar rules for dispute resolution, a fair and trusted process and an impartial decision-maker. Essentially the parties to the contract are accorded the freedom to define the contours of their dispute resolution process. However, the adjudicatory aspect of arbitral process is only a part of the entire route that the parties have to undertake. The enforcement of the arbitral award is perhaps the most important part of the process, but remains an obstacle that needs to be traversed. Executing a foreign arbitral award or a foreign judgment requires the winning party to take the judgment to a foreign country's court system, often to the award debtor's country where its assets are located. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') has facilitated the process of executing foreign arbitral awards. But the New York Convention does not address the situation where an award-winning party secures a foreign judgment in the rendering state, ie a confirmation judgment that upholds the validity of the arbitral award. How does such a foreign judgment relate to the award itself? In Malaysia, the Reciprocal Enforcement of Judgments Act 1958 (' the REJA') allows in its definition section for foreign arbitral awards to be registered and enforced vide a judgment which is registered and enforceable in the rendering state. Does this allow the holder of a foreign confirmation judgment to enforce the judgment rather than enforce the arbitral award under the Malaysian Arbitration Act 2005 ('the MAA')? Or does the MAA prevail over the REJA, or does the REJA have to be read subject to the MAA, as concluded by the Court of Appeal? Finally, what factors should guide the decision of the court? What approach should be undertaken when the court reviews the arbitral award? Should it be by way of a de novo hearing or a minimal curial review?

A **[2]** These are but some of the questions that arose in the context of the hearing and disposing of this appeal.

SALIENT BACKGROUND FACTS

B **[3]** The context in which the dispute between the parties arose is as follows.

[4] The respondent, incorporated in Johor Bahru, Malaysia, is a supplier of marine bunker fuels. It will be referred to as the respondent.

C **[5]** The first appellant, ING Bank NV, which is incorporated in Amsterdam, provides banking services to individuals and corporations globally.

[6] The second appellant, OW Bunker Far East (Singapore) Pte Ltd, incorporated in Singapore, is involved in the sale, supply and trading of D bunkers to supply fuel to ships at hubs and ports. The second appellant is a subsidiary of OW Bunker & Trading A/S. The parent company, OW Bunker & Trading A/S, filed for bankruptcy in the Danish courts. As a consequence, joint receivers were appointed over the group's assets. As of 13 November 2014 E joint receivers were appointed over the assets of, inter alia, the second appellant.

[7] The two appellants will be referred to collectively as 'the appellants'.

[8] ING Bank, the first appellant, was appointed on behalf of a syndicate of F banks to act as a security agent under a revolving borrowing base facilities' agreement on 19 December 2013, between it and one OW Bunker & Trading A/S.

[9] In conjunction with the execution of the facilities agreement, ING Bank, G the first appellant, also entered into an omnibus security agreement, pursuant to which OW Bunker & Trading A/S and its subsidiaries, one of which is the second appellant, assigned all their rights, title and interest in any amounts owed to them in respect of supply contracts, to ING Bank, the first appellant, as assignee. This included the two supply contracts entered into between the H second appellant and the respondent, which comprise the subject matter of this dispute. The existence of these two supply contracts is denied by the respondent.

The dispute

I **[10]** The appellants claim that a sum of US$935,525.27 together with US$1,827.97 (by way of an administration fee), is due and owing to them for the supply of bunkers to two vessels in or around 17 October 2014 and 29 October to 1 November 2014. The claim is made under two contracts,

which are disputed as to their existence by the respondent. The respondent maintains that these contracts do not subsist and no bunkers or marine gas oil were ever supplied to the two vessels under the contract notes.

[11] The appellants commenced arbitration proceedings in London ('London arbitration') against the respondent on 2 May 2017, pursuant to the arbitration agreement which incorporated a law an d jurisdiction clause in the OW Bunker terms and conditions ('OWB terms and conditions') into the sales contracts. The salient part provides as follows:

> P. LAW AND JURISDICTION
>
> P1. This Agreement shall be governed and construed in accordance with English law ...
>
> Except for circumstance referred to in Clause P.5 below all disputes arising in connection with this Agreement or any agreement relating thereto, save where the Seller decides otherwise in its sole discretion, shall be settled by arbitration in London, England in accordance with the Arbitration Act 1996 (or any subsequent amendment) ...

[12] The London arbitration was administered in accordance with the London Maritime Arbitrators Association rules. The appellants claimed, as stated earlier, sums stated to be outstanding under a 'Straits 1' sales order confirmation dated 17 October 2014 and a 'Dolphin 1' sales order confirmation dated 1 November 2014 ('the two disputed transactions') for the supply of marine gas oil or bunkers amounting to a total sum of US$937,353.24.

[13] The respondent participated in the arbitration subject to a reservation or protest as to the jurisdiction of the London arbitral tribunal ('London Tribunal'). Initially, the respondent's objection as to the jurisdiction of the London Tribunal to hear the claim was based on its position that the two disputed transactions did not subsist, namely that there was no such supply of marine gas oil under the two disputed transactions. The contention was that if the two disputed transactions never took place, then the two sales contracts are not genuine. The arbitration agreement is stipulated in the sales contracts. If there were no genuine sales contracts it would follow that there could not then have been any binding arbitration agreement between the parties.

[14] More than two years after the commencement of the London arbitration, the respondent amended its defence to state for the first time that there was another binding agreement between the parties known as the set off agreement dated 7 April 2014, which contained an arbitration clause that provided for the resolution of all disputes by arbitration seated in Kuala Lumpur, Malaysia with Malaysian law as the governing law and covered the

supply contracts, including the two contract notes. This defence was put forward notwithstanding the earlier defence that the two contracts for the supply of marine gas oil or bunkers did not subsist as no such oil was ever delivered ('the two disputed transactions'). The thrust of this defence was also stated to be jurisdictional, in that the respondent maintained that the entire dispute ought to have been dealt with by way of arbitration in Malaysia.

[15] The claim under the two disputed transactions were made fourteen months after the set off agreement. The terms and conditions for the sale of the marine gas oils or bunkers incorporate the OWB terms and conditions which, as stated earlier, provided for disputes to be resolved by arbitration seated in London, in accordance with the United Kingdom Arbitration Act 1996 and the London Maritime Arbitrators Association rules.

[16] The respondent maintains that:

(a) the two agreements are in conflict; and that

(b) in the event of a conflict, it is the set off agreement which prevails.

[17] Accordingly, the London Tribunal had no jurisdiction to hear the appeal on this alternative ground either. On the issue of the content of the amended defence, as well as the timing of the defence, the respondent maintained that it related to the same objection as to jurisdiction raised at the outset, in that it followed on from the original contention of a lack of jurisdiction, save that it was on expanded terms.

[18] The appellants objected to the inclusion of the 'new' defence more than two years after arbitration was commenced on the basis that it constituted a new ground and was too late. Additionally, they maintained that the new set off defence only arose if the OWB terms and conditions were not incorporated.

[19] The London Tribunal rejected the amendment on the grounds of delay but nonetheless went on to consider its merits, in the event it was wrong in failing to admit it. On the merits, the Tribunal found, in summary, that the set off agreement was to resolve disputes relating to set off, and not to supply contracts, which were the nub of the matter before the tribunal. It also found that the set off agreement was not worded with a view to overriding either party's standard terms and conditions of supply.

[20] On 4 February 2020, the London Tribunal ruled in favour of the appellants on both jurisdiction and merit.

[21] The respondent did not comply with the award nor apply to set aside or challenge the London award under s 67 of the Arbitration Act 1996 (under s 67

of the Arbitration Act 1996, the unsuccessful party may apply to the court: (a) to challenge the award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the arbitral tribunal on the merits to be of no effect due to the arbitral tribunal's lack of substantive jurisdiction). This had to be done within a period of 28 days from the handing down of the award.

The Malaysian arbitration commenced by the respondent

[22] On 11 June 2020 the respondent commenced arbitration proceedings in Malaysia in respect of the same subject matter. The chronology of undisputed events would not be complete without reference to these Malaysian arbitration proceedings initiated by the respondent pursuant to the set off agreement on 11 June 2020.

[23] In those proceedings the appellants raised a preliminary objection asking, inter alia, whether the determination of the jurisdictional issue in relation to the set off agreement by the Malaysian Tribunal would amount to res judicata and/or an abuse of process as the issues raised in the Malaysian proceedings had already been ventilated and decided in the arbitration, before the London Tribunal which was then registered and enforced as a judgment of the English High Court.

[24] On 29 March 2023, the Malaysian Tribunal handed down an award upholding the preliminary objections. It decided that it did not have the jurisdiction to determine any of the respondent's claims in the Malaysian arbitration by reason of res judicata. It also determined that the bringing of the proceedings in the Malaysian arbitration amounted to an abuse of process.

[25] The respondent then filed an application to set aside this Malaysian Award on 5 July 2023 (this application was filed on 5 July 2023 in the civil court and then transferred to the commercial court on 11 July 2023), under s 37 of the Arbitration Act 2005, OS No WA-24NCC(ARB)-24–07 of 2023 (this application was filed on 5 July 2023 in the civil court and then transferred to the commercial court on 11 July 2023). This application was heard and dismissed by the High Court on 30 May 2025 (the length of time it took was because before the High Court could hear the encl 1 application, the court had to deal with two interlocutory proceedings. The respondent filed encl 29 for a stay of the High Court proceedings pending the disposal of an application in the High Court proceedings in the present case, OS No WA-24–4–01 of 2021, encl 24 to set aside the registration of the UK judgment. Enclosure 29 was dismissed by the High Court on 17 October 2024 and was appealed to the Court of Appeal, Appeal No W-02(IM)(NCC)-1847–10 of 2024 which in turn dismissed the appeal on 27 May 2025. The respondent then filed encl 70

to stay the High Court proceedings pending the disposal of the Court of Appeal, Appeal No W-02(IM)(NCC)-1847–10 of 2024 and this was dismissed by the High Court on 20 March 2025) and is currently the subject matter of an appeal in the Court of Appeal filed on 11 June 2025.

English Commercial Court proceedings

[26] Following on from the decision of the Malaysian Tribunal above, in April 2023, the respondent filed proceedings against the appellants in the English Commercial Court alleging, inter alia, a breach of the arbitration clause in the set off agreement. These proceedings were struck out or dismissed on the grounds that '… it is hopeless and abusive in light of the London Award and the Cockerill Order as reflected in the Malaysian Award'.

[27] Permission to appeal to the English Court of Appeal was dismissed by the High Court and permission is now being sought in the Court of Appeal.

Registration in the English High Court of the award of the London Tribunal

[28] We now revert back in time to the registration in the English High Court of the arbitral award, which is a fundamental aspect of the present appeal. On 13 November 2020, the appellants obtained an order of leave from the English High Court *to enforce the award handed down by the London Tribunal*. Pursuant to s 66(1) and (2) of the UK Arbitration Act 1996, leave was granted to the appellants to enforce and judgment entered against the respondent in terms of the arbitral award.

[29] The English High Court granted permission for all papers to be served on the respondent out of jurisdiction in Malaysia as well as their solicitors in Singapore. It was disclosed to the English High Court that the appellants intended to enforce the judgment on the respondent in Malaysia. The respondent and its solicitors were duly served.

[30] The respondent elected not to exercise the remedies available to it to challenge the enforcement of the arbitral award in England.

[31] On 22 December 2020, under the provisions of the English Administration of Justice Act 1920, the appellants obtained an order under *s 66(1) that judgment be entered in terms of the award of the London Tribunal. The order was served on the respondent.* No attempt was made to set it aside or to appeal from the same. The respondent elected to challenge the arbitral award in Malaysia.

[32] As the said order for leave to enforce the award was not set aside within

24 days, it became enforceable as a judgment of the English High Court for the entire sum claimed by the appellants.

Registration of the English High Court judgment certifying the arbitral award as a judgment of the English High Court in Malaysia under the Reciprocal Enforcement of Judgments Act 1958

[33] The appellants on 22 March 2021 applied to register the English High Court judgment obtained under the REJA and obtained an ex parte order to that effect. The respondent filed an application to set aside the order registering the English High Court judgment listing four grounds:

(a) the English High Court had no jurisdiction to hear and enforce the award under s 66 of the UK Arbitration Act 1996;

(b) the English High Court judgment was obtained by fraud;

(c) the enforcement of the English High Court judgment was contrary to the public policy of Malaysia; and

(d) whether the respondent received notice of the proceedings in the English High Court.

[34] On 3 June 2021 the respondent filed an application for trial identifying four 'potential issues' requiring a trial prior to the determination of the setting aside application ('application for trial'). These issues comprise matters which were the subject matter of adjudication by the London Tribunal — whether there was a contract between the parties which incorporates the OWB terms and conditions and the arbitration agreement contained there; whether the first appellant, ING Bank was engaged in a money lending transaction with a third party that was being disguised as a contract for the supply of marine gas oils or bunkers by the second appellant to the respondent; whether there was an actual sale or delivery of such bunkers to the respondent; and whether the English judgment was therefore obtained by fraud in the circumstances of the case.

the REJA PROCEEDINGS

The decision of the High Court

[35] On 22 December 2021 the application for trial was dismissed by the High Court judge. The reasons for dismissing the application included, inter alia, the following matters:

(a) none of the issues raised required oral evidence to be adduced or for a trial to be conducted. Affidavit evidence was sufficient;

(b) the jurisdiction of the original court (the English High Court) could be

A determined on affidavit evidence alone without the need for oral evidence. The application of s 5 of the REJA is a matter of Malaysian law and there was no need for expert witnesses on English law;

(c) the respondent had not particularised the fraud on the English court or
B that the court was deceived into making the order; and

(d) as such the respondent's application was an abuse of the court process in that it was an attempt to prolong the determination of the setting aside application by the court, and to procure a decision of the Malaysian court
C which is inconsistent with the award of the London Tribunal and thus delay the registration of the High Court judgment by re-litigating issues which have already been raised.

The decision of the Court of Appeal

D

[36] In a comprehensive and meticulous judgment, the Court of Appeal held, in summary that:

(a) the High Court judge erred in holding that by failing to utilise the avenues available to it under the UK Arbitration Act 1996 to challenge
E the award, it chose to ignore the award at its own risk. The Court of Appeal held that this goes against the concept of comity and substantial reciprocity enshrined in the REJA and goes against the doctrine of res judicata and estoppel;

F (b) such a premise it held, was contrary to the established approach. The reason was because there is a specific statute governing arbitration. The statute provided for, inter alia, recognition and enforcement of a foreign arbitral award. The Court of Appeal went on to rely on s 8 of the MAA, which precludes a court from intervening in matters governed under it,
G save where specified. Coupled with express provisions on recognition and enforcement in the MAA in ss 38 and 39, it reasoned that proceeding under the REJA, as the appellants had done, flies in the face of the clear language of s 8 of the MAA. In short, s 8 precludes the winning party in an arbitral award from pursuing registration and
H enforcement of an arbitral award in any manner other than vide the MAA. This would include a judgment registered and enforced in the supervisory jurisdiction, such that the REJA is not an available means of registering and enforcing the judgment obtained pursuant to an arbitral
I award;

(c) the decision of the arbitral tribunal on jurisdiction under the *kompetenz-kompetenz* doctrine is never final and always open to challenge in the court of the seat of the arbitration, ie the seat court, or in the court before which the arbitral award is sought to be enforced, ie the

enforcement court which would normally be where the assets of the losing party are located; and

(d) the challenge at the seat court by an award debtor in seeking to set aside the arbitral award is the active remedy, while the challenge to resist the recognition and enforcement of the arbitral award is the passive remedy. The courts in Malaysia hear the recognition and enforcement application together with the setting aside application routinely. However, in an international arbitration the setting aside is at the seat court, which may be different from the jurisdiction where the party may want to enforce the arbitral award in its favour.

[37] As such the registration of a UK arbitral award as a UK judgment only allows enforcement of the award as a judgment within the jurisdiction ie the UK only. Such a registration does not extend to the enforcement of an arbitral award as a judgment overseas.

[38] As both ss 37 and 39 are applicable to both domestic and international arbitral awards, there is generally no bar to an award debtor who did not apply to set aside an arbitral award, to later oppose an enforcement application under s 39 and to raise the issue of a lack of jurisdiction by reason of the absence of a valid arbitration agreement. It was then concluded that the challenge to the arbitral award could be by way of setting aside the arbitral award in the seat court or to oppose enforcement in the enforcement court.

[39] Consequently, the Court of Appeal concluded that it was not open to the 'judgment creditor' to contend that res judicata applied in that the 'judgment debtor' could have applied to set aside the arbitral award at the seat of arbitration in London, but chose not to and is therefore estopped from objection to the enforcement of the arbitral award under the MAA.

[40] Equally, it was held that the 'judgment creditor' could not now contend that as the award debtor did not resist enforcement of the arbitral award in London, then it is estopped from objecting to jurisdiction in the Malaysian High Court because the passive remedy allows it do so, without attracting any form of res judicata or issue estoppel;

[41] On the issue of the jurisdiction of the arbitral tribunal, the Court of Appeal held in effect that the judgment creditor could not deprive the judgment debtor of its passive remedy by 'strategically electing to enforce the arbitral award that had been enforced in the UK High Court as a judgment of the court by way of registering the foreign judgment in the High Court of Malaya under the REJA'.

[42] Reliance was placed on *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ('Dallah') per Lord Mance who held that a person who denies being party to a relevant arbitration agreement has no obligation to participate in any arbitration or to take any steps in the seat country. The party initiating the judgment had to try to enforce the award where it could, and only then would it be incumbent on the defendant denying the existence of a valid award to resist enforcement. In short it was only incumbent upon the respondent to resist enforcement of the arbitral award in Malaysia and not in the seat country, ie the United Kingdom.

[43] The Court of Appeal further concluded that as the focus of the respondent was on the formation of the arbitration agreement, it went to the root of the jurisdiction of the arbitral tribunal. The court therefore had to hear the issue independently and afresh, irrespective of the decision of the arbitral tribunal. It further held that the court was not concerned with the challenge on findings of fact *en route* to the arbitral tribunal's decision on the underlying agreement being null and void. That was within the exclusive domain of the arbitral tribunal.

[44] In relation to the REJA the Court of Appeal held that while it refers to arbitral awards in its definition of 'judgment', this was qualified by the words in s 2 stipulating that: 'In this Act, unless otherwise required'.

[45] It then went on to hold that the REJA *cannot supersede the MAA* which 'came later and is a more specific legislation' governing all matters relating to or arising out of arbitration. In the event of a conflict the later legislation would prevail. The more appropriate legislation to utilise was the MAA as it is specific legislation pertaining to enforcement of an arbitral award compared to the REJA which is of general application to all judgments. Moreover, the REJA did not have a provision to prevent conflict of laws like the Courts of Judicature Act 1964 which has s 4.

[46] It was further held that the scheme of enforcement of a foreign arbitral award in our jurisdiction is by way of a s 38 of the AA 2005 application consistent with our treaty commitment under the New York Convention and the UNCITRAL Model Law ('the Model Law') where the jurisprudence is different from a registration of a foreign judgment *per se.* In short, the Court of Appeal effectively found that where a foreign arbitral award had been obtained to be enforced in Malaysia, the appropriate mode of enforcement was under the MAA (which is premised on the Model Law) and not by way of the REJA.

Judgment laundering

[47] The Court of Appeal went on to hold that the expert opinion prepared by Lord Thomas of Cwmgiedd was relevant because the application of English law in Malaysian proceedings is a question of fact. Lord Thomas's opinion is that the proceedings here, namely the registration of the arbitral award in the seat country ie the UK under s 66 of the UK Arbitration Act 1996, followed by the registration of that same English judgment under the REJA, amount to a 'judgment on a judgment' and would amount to 'judgment laundering'.

[48] The Court of Appeal held alternatively that if the route of registering a foreign arbitral award as a foreign judgment under the REJA is allowed, the same objection on jurisdiction may be raised. The judgment debtor, it held, should not be disadvantaged or suffer any prejudice in any way by reason of opting for this means of enforcement. It should be entitled to oppose the registration and enforcement in the same manner as under a s 38 of the MAA enforcement application.

[49] For these reasons the Court of Appeal concluded that the objection on jurisdiction could be raised.

The de novo approach to be adopted when hearing a jurisdictional objection

[50] Again, relying on *Dallah* and *Central Trading & Exports Ltd v Fioralba Shipping Company; The Kalisti* [2015] 1 All ER (Comm) 580, the Court of Appeal found that the approach to be adopted was that of a *de novo or re-hearing rather than a review on the issue of jurisdiction such that the court could determine the issue afresh.*

[51] The Court of Appeal further held that although this was an application under s 5 of the REJA and not one under s 38 of the MAA, it did not think that the appellants here could 'harness any perceived strategic advantage by the REJA route of registering the foreign judgment here in Malaysia'.

[52] Where issues relating to jurisdiction and fraud were raised bona fide before the court they could not be brushed aside on the grounds that it ought to have been raised earlier in the foreign seat court where the judgment debtor had not participated. It held that a jurisdictional objection could be raised under s 5 of the REJA itself. Moreover, the fact that the arbitral tribunal had heard the judgment debtor's witnesses and evidence and dismissed the evidence, it did not preclude the judgment debtor from raising the same, which we understand to mean the same witnesses and evidence, so as to facilitate an opposition to enforcement under s 38 of the MAA. In such an instance it held a *de novo* approach was to be utilised.

[53] In effect, the Court of Appeal determined that a new trial involving the

adducing of witnesses for both sides could be held without being influenced by the finding of facts of the arbitral tribunal. As such if fraud could be established, it would unravel everything including the arbitration agreement.

[54] Further on in the judgment at para [83] the Court of Appeal went on to state that it was not suggesting that the moment fraud is raised in the context of a lack of jurisdiction, the court in a de novo hearing 'must' conduct a full trial with witnesses called to determine the question of jurisdiction. The Court of Appeal qualified its earlier statements by stating that a court should have regard to the peculiar and particular facts of each case. It accepted that in certain cases, even where an independent rehearing of a jurisdictional issue was raised, all that the court needed to do would be to interpret the relevant documents. However, witnesses might have to be called in cases for instance where it was uncertain whether there was a concluded agreement to begin with.

[55] The Court of Appeal concluded that the judgment debtor, ie the respondent, had raised sufficient particulars of fraud in connection with the formation of the contract to warrant a trial of the issue with witnesses to be called. And it proceeded to allow the respondent's application for cross examination of witnesses as sought on this issue.

[56] Finally, the Court of Appeal concluded that the re-hearing of the jurisdictional issue in Malaysia notwithstanding the registration of the judgment in the UK, would not amount to a violation of the principle of international comity and substantial reciprocity as statutorily provided under the REJA. It reiterated that the 'more appropriate' statute for the registration and enforcement of a judgment was the MAA rather than the REJA. In any event, the judgment debtor, ie the respondent should not be deprived of the defences it could raise under the MAA in ss 38 and 39 even if the judgment creditor, ie the appellants chose to proceed under the REJA. And in further support, reference was made to s 5(1)(a)(ii) of the REJA, the ground that 'the courts of the country of the original court had no jurisdiction in the circumstances of the case'. In short, the Court of Appeal equated s 5(1)(a)(ii) of the REJA with s 38 of the MAA.

[57] The respondent's appeal was allowed and the Court of Appeal allowed the respondent's application for a trial of the issue of jurisdiction under O 67 r 9(2) of the Rules of Court 2012 ('the ROC').

The Federal Court

[58] The appellants sought leave to appeal against the decision of the Court of Appeal on several questions of law. Leave was granted in respect of the following questions of law:

(1) In a case where a superior court of a reciprocating country listed under the First Schedule of the Reciprocal Enforcement of Judgments Act 1958 (' the REJA') has entered judgment by way of an enforcement of an arbitral award ('foreign judgment'), where the judgment creditor seeks to register and enforce the foreign judgment under the REJA:

(a) whether the Malaysian court can resort to ordering a trial of issue or issues between the judgment creditor and the judgment debtor under O 67 r 9(2) of the Rules of Court 2012 ('the ROC') where those issues had been tried in the arbitration and determined in the award issued;

(b) whether a Malaysian court hearing an application under the REJA may exercise the powers and jurisdiction of a court hearing a matter under ss 37 to 39 of the Arbitration Act 2005;

(c) in the event that the answer to either of the above questions 1(a) or (b) is in the affirmative:

(i) having regard to the Court of Appeal case of *Mann Holdings Pte Ltd & Anor v Ung Yoke Hong* [2019] MLJU 101; [2019] 6 CLJ 475 (CA), whether the Malaysian court, sitting in such a trial of issue or issues between the judgment creditor and the judgment debtor, is entitled to reopen the merits or the propriety of the arbitral award upon which the foreign judgment was already entered, including the jurisdiction of the arbitral tribunal; and

(ii) having regard to the Supreme Court case of *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107; [1985] 1 LNS 131 (SC), what are the criteria or factors to be considered by a Malaysian Court before the court can order a trial of issue or issues under O 67 r 9(2) of the ROC.

Proceedings before the Federal Court

[59] The appeal was heard before us on 25 February 2025, 17 April 2025 and 10 June 2025. After the first hearing date, the court decided that it required the assistance of *amicus curiae* on certain aspects of the case. It advised the parties accordingly, who made no objection to the same. Professor Dr Jason Chuah, currently Dean of the Faculty of Law, University of Malaya, was selected as *amicus curiae* and the court posed the following questions of law to him:

(a) whether the winning party in an arbitral award is free as judgment creditor to choose between:

(i) the Reciprocal Enforcement of Judgments Act 1958 ('the REJA') and the Arbitration Act 2005 ('the AA') to enforce an international

A arbitral award which has been registered in the foreign jurisdiction in which the award was handed down; or

(ii) the AA, being *lex specialis*, and therefore the appropriate/preferable mode of seeking enforcement in Malaysia.

B (b) whether a challenge put forward as a 'jurisdictional' challenge, which is predicated on factual findings of fraud, is in law a true jurisdictional challenge; and

(c) in an enforcement application, whether under s 5 of the REJA or s 39 of the AA, where the judgment debtor raises a jurisdictional challenge, the C enforcing court undertakes a review or proceeds by way of rehearing?

[60] Given the full background of these proceedings, we now turn to consider the issues.

D

ISSUES

(a) whether the winning party in an arbitral award is entitled to enforce an international arbitral award which has been registered in the foreign jurisdiction in which the award was handed down under the Reciprocal E Enforcement of Judgments Act 1958; (' the REJA') and/or the Arbitration Act 2005 ('the MAA'), or is it restricted to enforcing the fruits of its arbitration only under the MAA?

(b) is the REJA (in relation to a foreign arbitral award which has been F converted to a judgment in the foreign jurisdiction) displaced in this jurisdiction by the MAA?

(c) is the REJA displaced on the grounds that it is *lex specialis*? Is the REJA to be read subject to the MAA?

G (d) whether a challenge put forward as a 'jurisdictional' challenge, which is predicated on factual findings of fraud, is in law a true jurisdictional challenge; and

(e) to what extent does a court review the evidence relating to fraud under the provisions of the REJA and O 67 r 9(2) of the ROC when those issues H have been tried and determined by the foreign arbitral tribunal and registered in that foreign jurisdiction? Does it extend to the Malaysian Court ordering a trial of issues between the judgment creditor and the judgment debtor under the provisions of the REJA?

I *Issue 1: Whether the winning party in an arbitral award is entitled to enforce an international arbitral award which has been registered in the foreign jurisdiction in which the award has handed down under the Reciprocal Enforcement of Judgments Act 1958 (' the REJA') and/or the Arbitration Act 2005 ('the MAA'), or is it restricted to enforcing the fruits of its arbitration only under the MAA?*

[61] In the instant appeal we are dealing with a foreign arbitral award, a foreign ancillary or confirmation judgment at the seat court in the UK registering the arbitral award as a judgment under the UK Arbitration Act 1996, and the registration and enforcement of that confirmatory judgment under our the REJA. The use of the word 'confirmation judgment' refers to the registration and enforcement of the judgment at the seat court.

[62] It is generally more common for an arbitral award winner to seek registration and enforcement under the MAA, rather than to obtain a confirmation judgment in the seat court and then seek to enforce the judgment under the REJA.

[63] Can such an approach be adopted by an arbitral award holder? Are the arbitral award and the confirmation judgment distinct entitlements, either of which the holder may execute on? Or conversely, is the award holder constrained to adopt recognition and enforcement solely under the UNCITRAL Model Law based Arbitration Act 2005?

[64] To answer these questions and the issues identified above, it is necessary to delve into the origins and background of both the REJA and the MAA in Malaysia.

Historical background to the legal framework for the registration and enforcement of international commercial arbitration in this jurisdiction

The arbitration legislation

[65] Prior to our accession to the New York Convention 1958, the relevant legislation dealing with international commercial arbitration was the Arbitration Ordinance XIII of 1809 evolving on to the Arbitration Act 1952 (see International Commercial Arbitration in Malaysia by Iyllyana Che Rosli Faculty of Law and International Relations, University Sultan Zainal Abidin (UniSZA); Pertanika J Soc Sci & Hum 29(S2) 135–148 (2021)). This period of the regulatory framework underscored a period when the courts were given broad supervisory powers over arbitration proceedings. Malaysian laws copied exactly from English laws. The Arbitration Ordinance XIII of 1809 applied to the Straits Settlements, ie Malacca, Penang and Singapore (see Davidson & Rajoo, 2006a). It was replaced by the Arbitration Ordinance 1890 in Penang and Malacca.

[66] In 1950 all States of the Federation of Malaya enacted the Arbitration Ordinance 1950, which was modelled on the English Arbitration Act 1889. It recognised the parties' right to opt-out of the jurisdiction of the Malaysian

courts, provided the parties expressed such intention in the arbitration agreement.

[67] This was followed by the Arbitration Act 1952 which came into force on 18 June 1952 (for all states except Sarawak, where it came into force on 1 November 1972) and followed England's Arbitration Act 1950 verbatim and made no distinction between domestic and international arbitration (see Davidson & Rajoo as above). This period too accorded the courts wide supervisory powers to intervene in the arbitration process, in all aspects. Such powers have been viewed as excessive and unnecessary.

The Reciprocal Enforcement of Judgments Act 1958

[68] Chronologically speaking, the next relevant piece of legislation in relation to the enforcement of international commercial awards which have been confirmed as judgments in the seat court is the REJA which was enacted in 1958. It is an act for the reciprocal enforcement of judgments of superior courts and came into effect in Peninsular Malaysia on 1 January 1959 and in Sabah and Sarawak on 1 December 1972. The REJA is applicable to date.

[69] Section 2 of the REJA specifies that a 'judgment' under the Act includes an 'award in proceedings in an arbitration if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place; …'. This applicability to arbitral awards only applies to a country within the Commonwealth.

[70] Order 69 r 9 of the ROC fortifies the applicability of the REJA. It provides:

> Where an award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a Court in that place, an applicant may enforce the award in the manner provided for under rule 8.

[71] It is worth noting, as explained by the learned *amicus curiae* that the origins of the REJA are colonial in nature and can be traced back to ss 13 and 14 of the Indian Civil Procedure Code 1882 (replaced by the 1908 version). An explanation was added to s 14 to the effect that 'the *Courts in British India must examine*, in a suit *based on a foreign judgment of any foreign Court in Asia and Africa* (excepting a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Consular Court established by an Order of Her Majesty in Council) the *merits of the judgment* when it was pleaded as a bar in a suit before the British Indian Courts'. (Emphasis added.)

[72] This effectively precluded the judgments of courts in Asia and Africa from being placed on an equal footing with those in the UK or Europe. This appears to run counter to the concept and purpose of reciprocity which is grounded on nations being on an equal footing. However, the REJA although based on the Indian statute, makes no such distinction between nations.

[73] The object and purpose of the REJA is to facilitate the enforcement of foreign judgments through reciprocity. *Reciprocity is a principle of international law where one state accords certain benefits or privilege to another state, based on the expectation that the other state will provide similar benefits or privileges in return. As such it is a mutual exchange and a form of co-operation premised on the concept of equal treatment and fairness.*

[74] As explained by the appellants, the REJA is the Malaysian adaptation of the United Kingdom's Administration of Justice Act 1920 ('the AJA 1920') as well as the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('the 1933 Act'). The former was enacted in respect of Britain's colonies, dominions and protectorates, while the 1933 Act dealt with foreign judgments from other jurisdictions like Austria, Italy and Norway. Malaysia remains a jurisdiction listed under the AJA 1920.

[75] Of significance is the appellants' submission that the REJA incorporates the definition of 'judgment' in s 2 from the AJA 1920 but derives its registration and supervisory provisions from the 1933 Act. Therefore, the REJA is something of an amalgamation of both. For present purposes, it is the curial and supervisory powers that are relevant in relation to foreign judgments.

[76] The difference between the AJA 1920 and the 1933 Act is the scope of judicial supervision exercised by the registering court. The AJA 1920 allows for a broad discretion which accords the registering court the ability to assess the enforceability of the foreign judgment 'if in all the circumstances of the case', the court considers it 'just and convenient'. This effectively means that the supervising court has a wide discretion to examine the foreign judgment sought to be registered and enforced — plausibly the merits.

[77] Whereas the 1933 Act does not accord such a subjective and broad discretion to the registering and enforcement court but is premised on the fulfilment of statutory requirements. Once these requirements are fulfilled the registering court, '... shall ... order the judgment to be registered'. The judgment debtor may apply to set aside such registration also on six specific statutory grounds, including registration and fraud. And this is the basis on which the REJA was adapted. It remains so to this day.

[78] In short, under the REJA, when a foreign judgment which includes an

arbitral award which has been registered as a judgment in the seat court is sought to be registered and enforced, it is governed by whether the statutory provisions of the REJA are fulfilled or not. It is not governed by a broad discretion to look at 'all the circumstances of the case' and make a determination that is 'just and convenient'. There is no unfettered discretion to reopen the entirety of the confirmation judgment and the arbitral award underlying it, to re-hear the matter in full.

[79] Therefore, under the REJA, it is strictly the fulfilment of the statutory provisions that determines whether a foreign judgment is to be registered and enforced or otherwise. However, as the judgment in cases such as the instant appeal relate to a foreign arbitral award, the applicability of the provision relates to whether the arbitral award, (which is deemed to be a judgment by reason of the confirmation/ancillary judgment) fulfils the requisite statutory requirements. This issue will be dealt with in greater detail further on in the judgment.

Further legislation on arbitration

[80] In 1980, some years before Malaysia ratified the New York Convention 1958, the Arbitration (Amendment) Act 1980 was passed to amend the then existing Arbitration Act 1952. It was enacted to reduce interventions in the arbitration process by the courts in the exercise of their supervisory powers. It also sought to adopt best practices for arbitration under the then newly established Kuala Lumpur Regional Centre for Arbitration ('KLRCA').

[81] It allowed for arbitration to be held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 ('ICSID'), or the UNCITRAL Arbitration Rules 1976 and the Rules of the KLRCA, without intervention from the courts (see *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183).

[82] Notwithstanding this, arbitration proceedings and enforcement of foreign awards were still subject to the full supervisory powers of the national courts, unless arbitration proceedings were held under ICSID, UNCITRAL Rules or the (then) KLRCA Rules.

[83] In 1985 Malaysia acceded to the New York Convention 1958. It was given effect domestically with the enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the CREFA').

[84] The CREFA served as the enabling act for the application of the New York Convention 1958 in Malaysia (until it was repealed by the MAA). The

CREFA however, still had to be read together with the Arbitration Act 1952 whenever parties brought an action to recognise or enforce foreign awards domestically. While the CREFA gave effect to the New York Convention 1958 by providing that Malaysia would recognise and enforce relevant international commercial arbitral awards, the procedure for enforcement of arbitral awards still fell under the Arbitration Act 1952. This was not entirely satisfactory.

[85] On 30 December 2005, the MAA was enacted. It repealed the Arbitration Act 1952 as well as the CREFA 1985. The MAA adopted the Uniform Model Law with some modifications to suit this jurisdiction. The MAA is premised on the New Zealand Arbitration Act 1996 and is a single act, covering both domestic and international commercial arbitral awards. The current provisions implementing the ethos of the New York Convention in this Model Law based legislation, are ss 38 and 39.

[86] Amendment Acts were passed in 2011 to provide for greater clarity and to conform to article V of the New York Convention 1958. And a further amendment was made in 2018 for the change of name from KLRCA to Asian International Arbitration Centre ('AIAC').

Enforcement regimes in Malaysia

[87] What then may be gleaned from the chronology and history of the supervisory legislation available in the national courts in relation to the registration and enforcement of arbitral awards?

[88] Does the award creditor:

(a) have the option of registering and enforcing its arbitral award under the MAA or obtaining a confirmation judgment from the seat court and enforcing that confirmation judgment under the REJA? or

(b) is the award creditor bound to enforce the arbitral award solely under the MAA?

[89] The appellants contend that a successful award holder may proceed to choose between the MAA and the REJA to register and enforce the arbitral award. The respondent contends otherwise, maintaining that the law does not permit the dual enforcement of foreign arbitral awards under both the REJA and/or the MAA.

[90] The appellants point to the REJA to submit that the common object and purpose of the REJA is to facilitate the enforcement of foreign judgments through the principle of reciprocity. They refer to *SS Lotus (Fr v Turk)* 1927 PCIJ (ser A) No 10 (Sept 7), a case of the Permanent Court of International

Justice which recognised that a state's jurisdiction is 'certainly territorial' and cannot be extended to another state unless there is a permissive rule from customary international law or treaty law. They go on to cite *Mann Holdings Pte Ltd & Anor v Ung Yoke Hong* [2019] MLJU 101; [2019] 6 CLJ 475 (CA) ('Mann Holdings').

[91] As such they maintain that given the importance of comity and reciprocity, the REJA remains a mode of registration and enforcement of a confirmation judgment premised on an arbitral award as expressly provided in the REJA.

[92] The appellants also submit that given the provisions of the REJA, any confirmation judgment must be subject to limited scrutiny. The enforcing court under the REJA should exercise its jurisdiction and powers by way of a review rather than a full adjudication of the matter afresh.

[93] The respondent maintained that the law does not permit the dual enforcement of foreign arbitral awards under both the REJA and the MAA. Where the subject of enforcement is a foreign arbitral award, the MAA constitutes the proper and exclusive statutory framework. In support of this proposition the respondent points to s 8 of the MAA, the Model Law and Parliament's intention in enacting the MAA. It is further submitted that this is not a matter of procedural election or convenience but one of jurisdictional integrity and statutory coherence. The MAA as *lex specialis*, prevails over the REJA in the context of enforcing foreign awards.

[94] Alternatively, the respondent maintains that even if a party is entitled to elect between the two regimes, any enforcement would still remain subject to a broad judicial scrutiny, particularly where serious jurisdictional defects on account of fraud arise. Otherwise, it is contended that this would amount to 'judgment laundering' in that an award by conversion to a foreign judgment would escape the protections and safeguards under the MAA, which is based on the Model Law.

[95] Dual enforcement, it is maintained, is not only impermissible but also redundant. This is attributed to the fact that the MAA provides a comprehensive enforcement mechanism consistent with the Model Law. To that extent the REJA adds no legitimate enforcement benefit, and serves to obscure the proper legal framework and possibly bypass the protections embedded in the MAA/Model Law. It is further submitted that the use of the REJA serves no legitimate purpose and risks undermining the very structure and policy objectives of Malaysia's modern and internationally aligned arbitration regime.

Our analysis

The principle of reciprocity

[96] We start with the principle of reciprocity. The principle of reciprocity means the right to equality and mutual respect between states. It describes the rule by which a state grants benefits and rights to another state but only if that other state grants the same treatment. It effectively guarantees uniform conduct and the fulfilment of international obligations vide the application of the rule *quid pro quo* (from the Latin: this for that). This principle has served as a basis for tempering the application of the principle of the territoriality of laws, which would generally preclude the recognition of a foreign judgment or arbitral award of one state in another state.

[97] The definition of 'judgment' in s 2 of the REJA, by including an arbitral award which has been registered in the seat court as a judgment, effectively incorporates international arbitral awards as an integral part of the REJA. This in turn means that the principle of reciprocity as contained in the REJA, comprises an independent mode of recognition of arbitral awards through their confirmation judgments in this jurisdiction. The express words in s 2 cannot, under the principles of statutory interpretation be disregarded or discounted, by for example, the use of words such as 'unless otherwise …', as they comprise express provisions relating to a separate genre of adjudication, by way of arbitration.

[98] The inclusion of such arbitral awards in the form of confirmation judgments is clear from the deeming provision in s 2. Arbitral awards are effectively considered, by statute, to be judgments capable of being recognised and enforced in this jurisdiction on the principle of reciprocity.

[99] In *Mann Holdings*, Justice Mary Lim, then in the Court of Appeal explained that the entire basis for the REJA starts with the concept of comity and substantial reciprocity between states:

> [58] Coming then to the Act itself and its operation. The Reciprocal Enforcement of Judgments Act 1958 is a specific legislation enacted by Parliament to confer specific jurisdiction on the courts to register judgments given by superior courts of those reciprocating countries listed in the First Schedule to the Act. The whole basis of the Act starts with the concept or principle of comity and substantial reciprocity between nations. This is evident from the terms of s 3(2).

[100] Section 3(2) specifies substantial reciprocity being accorded by this state, where a foreign state guarantees that the enforcement of judgments given by the High Court in this jurisdiction is similarly or equally recognised for the purposes of recognition and enforcement. This falls squarely within the ambit

of the principle of reciprocity as defined above. Such reciprocity does not take its ancestry from any convention or treaty or model law. Its origins are derived from a mutual recognition which one state allows within its territory to the 'legislative, executive or judicial acts of another nation' (see *Hilton v Guyot* 159 US 113 (1895); *Mourgard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (SCC)) to another state, on the basis of international duty and convenience.

[101] Further on in *Mann Holdings* it was held:

> [61] The courts in Malaysia are no stranger to recognising and enforcing legislation or principles based on this doctrine of international comity and substantial reciprocity. ... The principle of international comity is an internationally recognised and accepted concept especially within the Commonwealth, with the courts striving to avoid conflicting decisions between civilised and friendly nations as amplified in the case of *The Abidin Daver* [1984] HL 398.

[102] In relation to the REJA, Mohd Nazlan J (now JCA) in his analysis of the history and background of the REJA stated in *Standard Chartered Bank (Singapore) Limited v Pioneer Smith (M) Sdn Bhd* [2015] MLJU 710; [2015] 7 CLJ 677:

> ... the Act enshrines legal reciprocity which arguably has a stronger theoretical affinity with the concept of comity and which is generally effective only to the extent that foreign judgments do not directly conflict with the other country's public policy ...

[103] It emerges from the analysis of the case law in this jurisdiction relating to the REJA that the basis for the registration and enforcement of judgments under the statute is premised on reciprocity which is closely linked with comity. It enables this state to enter into what is in effect a 'special' relationship with a foreign state through statute, which recognises and confers rights of recognition and protection to judgments of the superior courts of Malaysia on the basis that similar and equal treatment is accorded to their superior court judgments. This is not a statutory arrangement that is conferred lightly, but is prescribed by statute and recognises the singular relationship that each of these states enjoys with Malaysia.

[104] The principle of reciprocity is recognised in other jurisdictions. In *Strategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence* [2021] 4 All ER 189; [2020] EWCA Civ 1604; [2021] 2 WLR 448 ('Strategic') the English Court of Appeal stressed that the AJA 1920 was similarly founded on reciprocity rather than mutual trust: '... the essential principle therefore was not as it might have been, one of 'mutual trust' between different parts of the Empire, but a principle of reciprocity with safeguards'.

[105] The analysis of the origin of the English statute which is similar to the REJA (save that the REJA incorporates salient portions of the 1933 Act) is consistent with the analysis in this jurisdiction.

The origins of the REJA and the MAA are unconnected and distinct

[106] The point sought to be made is that the REJA, which is premised on the principle of reciprocity, is wholly different and separate from the registration and enforcement of an arbitral award under the MAA. The latter statute takes its origin from the Model Law which is an expansion of, and inextricably connected to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'). The New York Convention was recognised and brought into domestic law by the enactment of specific statutes relating to the enforcement of arbitral awards (as set out above).

[107] This culminated with the enactment of the MAA, which recognises and allows for the enforcement of foreign arbitral awards. The MAA encompasses and brings into its content the ethos and philosophy of the New York Convention, while being fashioned on the basis and structure of the Model Law. This is borne out by a perusal of the Hansard on the enactment of the MAA, which specifically provides that the New York Convention is encapsulated in the MAA. In the Hansard dated 7 December 2005, the Minister clarified that the New York Convention Act would be 'disatukan' into the MAA:

> Akta Konvensyen Mengenai Pengiktirafan dan Penguatkuasaan Award Timbang Tara Asing 1985, Akta 320 membolehkan Award Timbang Tara yang dibuat di luar Malaysia dikuatkuasakan di Malaysia. *Peruntukan Akta 320 telah disatukan dalam Rang Undang-Undang Timbang Tara 2005.* (Emphasis added.)

[108] In adopting the Model Law through the MAA, Malaysia has indeed allowed for a far greater reach in terms of the enforcement of international commercial arbitral awards. It is the primary and 'go-to' statutory mechanism or route for the registration and enforcement of foreign arbitral awards. It is certainly the most direct means of enforcement.

[109] These two statutes therefore comprise two separate and discrete modes or avenues for the registration and enforcement of foreign arbitral awards — the REJA through the recognition of confirmation judgments premised on an arbitral award in respect of a relatively few and select states as expressly provided for in the Act, while the MAA provides a direct route for the registration and enforcement of foreign arbitral awards generally. As such these two distinct sources or modes of registration and enforcement of arbitral awards under the two independent statutes provide two discrete avenues for

award holders to proceed. It must be emphasised, although obvious, that the REJA is neither a treaty nor a convention, but a statute which has not been repealed nor amended in any manner in relation to the registration and enforcement of judgments, which includes confirmation judgments arising from arbitral awards, in relation to the select countries afforded reciprocity under the REJA.

Issues 2 and 3: Does the MAA prevail over or impliedly repeal the REJA in relation to the registration and enforcement of confirmation judgments arising from arbitral awards?

[110] The next question that arises is whether such express recognition in a statute premised on reciprocity, namely the REJA, is displaced outright, on the grounds put forward by the respondent, namely that:

(a) the MAA is a specific and latter enactment and should therefore displace or prevail over the earlier the REJA. This is so by reason of the legislative intent behind the enactment of the MAA which serves to streamline the enforcement regime for foreign arbitral awards in this jurisdiction and precludes reliance on any alternative enforcement mechanism like the REJA;

(b) s 8 of the MAA precludes the winning party in an arbitral award from pursuing registration and enforcement of an arbitral award in any manner other than vide the MAA; and

(c) there is an implied repeal of the provisions in the REJA by reason of 'inconsistencies' between the two statutes, such that the MAA remains the only way of enforcing a foreign arbitral award such that a confirmation judgment premised on an arbitral award can no longer be enforced under the REJA.

Does the legislative intent behind the MAA have the effect of ousting or prevailing over the REJA such that it is the sole means of enforcement of a foreign arbitral award?

The respondent's submissions in summary

[111] The respondent looks to the legislative intent behind the MAA Bill and relies on the Hansard of 7 December 2005. It provides in essence that the MAA is adapted from the Model Law to suit the circumstances in Malaysia. It was further stated that the MAA was intended to update arbitration laws that exist with new provisions that are more relevant to arbitration in Malaysia. The laws sought to be repealed were the Arbitration Act 1952 and the CREFA.

[112] The respondent highlights that article VII of the New York Convention was not adopted into the Model Law. Article VII relates to the primacy of bilateral agreements for enforcement to the extent allowed by local law. It stipulates:

> 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
>
> 2. ...

[113] It is contended that as article VII of The New York Convention was not incorporated into the Model Law 'despite it being mentioned in passing', it follows that the Model Law was meant to be all-encompassing and *lex specialis.*

[114] That presumably means that the respondent contends that as the primacy of multilateral or bilateral agreements or the law of the country was not specifically incorporated into the Model Law and thereby the MAA, it follows, by reason of such failure that the MAA assumes primacy over all other multilateral or bilateral agreements as well as, seemingly, the REJA itself (in so far as it refers to confirmation judgments in relation to arbitral awards).

[115] It is further pointed out that this exclusion of article VII of the New York Convention from the Model Law reinforces the point that the MAA operates as a self-contained regime, and as such, the REJA cannot be utilised as an alternative enforcement mechanism.

The appellants' response in summary

[116] The appellants contend otherwise, maintaining that the non-inclusion of article VII in the Model Law (which comprises the basis for the MAA) does not mean that a contracting state is required to abandon national laws relating to the enforcement of arbitral awards such that the Model Law, as enacted through the MAA, becomes the sole means of enforcing foreign arbitral awards.

Our analysis on whether the MAA ousts or prevails over the REJA

[117] In our view, the respondent's conclusion that all other laws are effectively 'ousted' upon the enactment of the MAA which is based on the Model Law by reason of the exclusion of article VII in the Model Law itself, runs awry of the philosophy and underlying purpose and object of the Model Law itself, not to mention the New York Convention.

[118] On 11 December 1985 the General Assembly of the United Nations adopted a resolution approving the Model Law on International Commercial Arbitration that had been prepared by the United Nations Commission on International Trade Law ('UNCITRAL'). The resolution sets out key points that relate to the purpose and background of the Model Law. The Resolution stipulates, inter alia, that:

> ... Being convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly significantly contributes to the *establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.* (Emphasis added.)

[119] The relationship between the Model Law, the UNCITRAL Arbitration Rules and the New York Convention is, as emphasised above by the General Assembly Resolution itself as 'a unified legal framework' for international commercial arbitration awards. It follows that it is incorrect to view UNCITRAL as a standalone unitary mechanism for registration and enforcement of international arbitral awards. On the contrary, a critical role is played by international treaties in the recognition and enforcement of arbitral awards. This must include the New York Convention which is the most widespread and effective instrument for the recognition of foreign arbitral awards.

[120] It follows from a comprehension of the UNCITRAL Model Law as passed by the General Assembly and as quoted above that the New York Convention is to be read with the Model Law *as part of a unified legal framework*. The failure to specifically incorporate article VII in the Model Law cannot, of itself therefore, detract from the need to read the Model Law in harmony and conjunction with, and not in isolation from, the New York Convention. It specifies that this unified legal framework is to achieve harmony and to effectuate fair and efficient enforcement. After all, the Model Law evolves and takes root from the New York Convention to establish a model law on arbitration that is acceptable to states with different legal, social and economic systems. Therefore, in construing the MAA, it is imperative that the purpose and object not only of the Model Law as well as the fundamental principles and philosophy of the New York Convention are considered. Malaysia is a contracting state and has been so since 1985.

[121] Secondly, it is of importance to comprehend that while the New York Convention as enacted in this jurisdiction by the CREFA was repealed on the enactment of the MAA, the Minister vide the Hansard dated 7 December 2005 clarified that the New York Convention Act would be incorporated or included into the MAA (as referred to earlier at para 107). It follows from the

foregoing that the New York Convention was expressly incorporated in the MAA, which in turn is based on the Model Law. This significant portion of the Hansard was not referred to by the respondent.

[122] Thirdly, it should also be pointed out that article 1 of the Model Law which deals with the scope of application of the law states:

> (1) This Law applies to international commercial arbitration, *subject to any agreement in force between this State and any other State or States.*

[123] The words 'This Law' means the law enacting the Model Law, and in this jurisdiction would refer to the MAA. As such, it follows from article 1(1) of the Model Law, that the Model Law is subject to any agreement in force between this state and any other state or states. Therefore, the Model Law itself recognises and gives precedence to multilateral or bilateral conventions, including the New York Convention as well as treaties. As the Model Law itself does not purport to thwart or override conventions and treaties in force, it would logically follow that the MAA itself envisages that it is not the sole means of registering and enforcing foreign arbitral awards. It recognises expressly that there may well be other conventions or treaties that also afford means of enforcement. As the MAA is based on the Model Law, it follows that the legislative intent of the MAA is equally premised on the Model Law. It would therefore follow that the MAA does not, and should not preclude or prohibit other means of enforcement that an award holder might choose to use. It would run counter to the basic ethos of enabling and facilitating the enforcement of arbitral awards expeditiously.

[124] What more a statute, namely the REJA which comprises an important part of the domestic law of the state, and which incorporates bilateral agreements between Malaysia and other individual states, as specified in Schedule 1 of the REJA. It would not be possible to extend the 'exclusion' of article VII of The New York Convention to the extent of effectively repealing express provisions of a Malaysian statue such as the REJA.

[125] In these circumstances the suggestion of any form of implied repeal is unsustainable.

[126] Fourthly, in UNCITRAL's explanatory note of the Model Law, albeit acknowledged as being a note for informational purposes and not of binding force, it explains clearly that the enforcement procedures in the Model Law are meant to 'supplement[s]' and not detract from the New York Convention (see the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial arbitration as amended in 2006).

[127] The Explanatory Note provides:

> 51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

[128] Indeed, the official analytical commentary of the UNCITRAL Secretariat preceding the adoption of the Model Law echoes this suggestion by explaining that the Model Law's enforcement procedure under articles 35 and 36 is intended to be a 'supplementary network of … enforcement' operating in 'full harmony with the 1958 New York Convention'.

[129] The net effect of the respondent's submission is that by not including article VII of The New York Convention in the MAA, the primacy of other treaties and conventions were effectively subordinated to the MAA, including by way of implied repeal, the REJA. It is obvious from the foregoing provisions that this is not an accurate submission.

[130] Fifthly, it is important to note that the REJA is a subsisting statute that remains in force and has done so, since 1958. At no time during the enactment of the MAA was any attempt made, or any objection raised, about the alternative route of the REJA to enforce a foreign arbitral award through a confirmation judgment. Neither was there any repeal, removal or amendment of the REJA so as to preclude or prohibit the registration and enforcement of foreign arbitral awards through confirmation judgments from the seat country.

[131] Section 2 of the REJA was not at any time repealed or sought to be repealed to exclude confirmation judgments, as has been done in other jurisdictions, such as New Zealand. As such it cannot be said that there has been any form of repeal, albeit express or implied, of the right of an award creditor to seek to register and enforce an arbitral award which has been registered as an enforceable judgment in the seat country ie the confirmation judgment under the REJA.

[132] In the absence of any such express provision precluding confirmation judgments based on arbitral awards being registered and enforced, it follows that the definition provision which allows for a different avenue of enforcement must remain in force. It would require an amendment or removal by Parliament itself, to negate the scope and width of the REJA in this respect. It is not reasonable for the courts to usurp Parliament's power by attempting to construe such a formidable prohibition from the mere alleged exclusion of article VII of the New York Convention or to read such a prohibition as stemming from the Model Law. Any form of construction leading to an implied repeal would be fatally flawed from the onset. It is not possible under

the ordinary rules of statutory interpretation to oust or make unenforceable express provisions of the REJA which constitute an important part of the enforcement framework.

[133] In this context, it is worth reiterating that as the REJA is premised on a special relationship of reciprocity between Malaysia and specified states, it is not plausible to use the general provisions of another distinct statute, which originates from the New York Convention and the Model Law, to preclude or prevent a statutory mode of enforcement specifically enacted by Parliament.

[134] In any event, this would go against the underlying intent and purpose of the New York Convention and the Model Law, which serves to make enforcement of a foreign commercial arbitral award as straightforward and as expeditious as possible. This is certainly not achieved by seeking to prohibit another possible avenue of enforcement of such awards vide national statutes recognising confirmation judgments arising from such foreign arbitral awards.

Section 8 of the MAA — Does it displace or repeal the REJA?

[135] The respondent argued that as the MAA is a specific enactment relating to international arbitration and the recognition and enforcement of awards it must take precedence over the general provisions of the REJA which only concern the reciprocal enforcement of judgments of the superior courts. Reliance is placed on s 8 of the MAA to reinforce this point. The section provides:

> ... No court shall intervene in matters governed by this Act, except where so provided in this Act.

[136] Therefore, the respondent contends, the MAA should prevail over the REJA as the sole means of enforcement of arbitral awards.

[137] The appellants submit in response that the effects of s 8 are curtailed to the Arbitration Act and not outside of it.

[138] In its judgment the Court of Appeal, as outlined earlier, relied on s 8 of the MAA to maintain that it precludes a court from intervening in matters governed under it, save where specified. Coupled with the express provisions on recognition and enforcement in the MAA in ss 38 and 39, it reasoned that proceeding under the REJA, as the appellants had done, *flies in the face of the clear language of s 8 of the MAA*.

[139] As such it was concluded by the Court of Appeal that s 8 precludes the winning party in an arbitral award from pursuing registration and enforcement

of an arbitral award in any manner other than vide the MAA. This would include a judgment registered and enforced in the supervisory jurisdiction, such that the REJA is not an available means of registering and enforcing the judgment obtained pursuant to an arbitral award.

[140] We are of the view, with the greatest respect, that the approach undertaken by the Court of Appeal does not reflect the purport and object of either the REJA or the MAA.

Our analysis on the s 8 of the MAA argument

[141] We are not persuaded that s 8 of the MAA, in itself, has the effect of displacing or impliedly repealing parts of the REJA or relegating the MAA as the sole source of enforcement of arbitral awards, even where a confirmation judgment has been obtained. It is apparent that s 8 relates to court intervention, *solely related to matters governed by the MAA.*

[142] What are the matters governed by the MAA? Domestic and international commercial arbitral awards. The MAA does not assume jurisdiction over, and accordingly cannot affect the registration of judgments, including confirmation judgments in respect of arbitral awards. Such confirmation judgments are governed by the REJA as a consequence of the express definition of judgment in s 2, which includes arbitral awards which are registered and enforceable in the seat court.

[143] Put simply, a confirmation judgment premised on an arbitral award is a judgment and is, to that extent, expressly recognised and enforceable under the REJA, while an arbitral award *per se* is recognised and enforceable under the MAA. *Section 8 cannot expand its reach to encroach on the REJA*. Any such interpretation is unsound, as the express words of s 8 itself are limited to the MAA (see *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 (FC)).

[144] The *travaux preparatoires* of the Model Law namely article 5 which is equivalent to s 8 of the MAA, states that it does 'not exclude court intervention in any matter not regulated in the Model Law'. It is therefore clear that not only does s 8 not intrude on matters not regulated within the MAA, but would not be applicable in relation to matters falling within the purview of a different statute such as the REJA. This may appear to be obvious, but needs to be stated. Section 8 therefore controls or regulates judicial and curial intervention in respect of the selected areas specified in the MAA itself.

[145] Again, this is in accordance with the principles of *The New York Convention, the Model Law and the scope of the Model Law* (as stated earlier)

which expressly preserves the validity of multilateral and bilateral conventions, treaties and domestic law. It does not seek to curtail other avenues expressly provided for the enforcement of arbitral awards.

[146] As submitted by the appellants, the UNCITRAL Secretariat Guide provides, inter alia, as follows:

> By virtue of article VII(1), Contracting States will not be in breach of the Convention by enforcing arbitral awards pursuant to provisions of domestic laws or treaties that are more favourable to enforcement. This reflects the notion that the New York Convention sets a 'ceiling' or the maximum level of control, which national courts of the Contracting States may exert over the recognition and enforcement of arbitral awards.

[147] It therefore follows that by any construction of s 8 of the MAA which is a clear provision, judicial intervention only comes into play in respect of matters regulated by the MAA and cannot be construed so as to affect the validity of other multilateral or bilateral agreements concerning the recognition and enforcement of foreign judgments. If treaties and conventions do not fall within its reach, what more the REJA, which is subsisting legislation that expressly authorises the registration of confirmation judgments arising from arbitral awards.

[148] Therefore, this construction of the law by the respondent is without merit.

The *lex specialis* argument

[149] Intimately connected with the s 8 argument is the *lex specialis* argument as outlined by the Court of Appeal. In deciding that in Malaysia there is only one route for the recognition and enforcement of arbitral awards in Malaysia, namely the MAA, it held, inter alia, that cognisance had to be taken of s 8.

[150] We have dealt with that issue above. The Court of Appeal went on to conclude that the REJA could not supersede the MAA which came later, and is more specific legislation governing all matters relating to or arising out of arbitration. In the event of an apparent conflict or confusion, later legislation would prevail. And in this context the more appropriate legislation would be the MAA as it is more specific legislation relating to the enforcement of an arbitral award compared to the REJA which is of general application to all judgments. And reliance was then placed on the principle of *generalia specialibus non derogant* (https://content.next.westlaw.com/practical-law/document/Id50051cae1b011e698dc8b09b4f043e0/Generalia-specialibus-non-derogant?viewType=FullText&transitionType=Default&contextData=(sc.D

efault)). In the realm of arbitral awards, it was held that the MAA is *lex specialis* which prevails over the REJA.

[151] We are of the considered view that this conclusion, with respect, is not supported in law for, inter alia, the following reasons:

(a) the rule of *lex specialis* does not come into play in this comparison, as there does not subsist a general law for the enforcement of arbitral awards which conflicts with a specific law for similar enforcement. And this is because the comparison is being made between the REJA and the MAA, where the former relates to the enforcement of judgments, albeit confirmation judgments, and the latter, original arbitral awards. In *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited* [2022] SCCA 58 where the Seychelles Court of Appeal rejected the award debtor's submission that the foreign judgment was not a 'judgment in the strictest sense but actually an arbitral award. The court rejected this as the definition of 'judgment' under their statute included foreign judgments founded upon arbitral awards (similar to s 2 of the REJA). Thus, they were judgments for the purpose of enforcement under the Seychelles statute;

(b) REJA and the MAA are two separate and distinct pieces of legislation as we have explained earlier. The REJA deals with judgments including confirmation judgments, while the MAA deals with arbitral awards. Strictly speaking, there can be no conflict arising in terms of the registration and enforcement of judgments and arbitral awards. The nexus between the two is the recognition of arbitral awards when they are converted to confirmation judgments as comprising a judgment falling within the ambit of the REJA, but only in respect of certain specified jurisdictions. And that is premised on the legal principle of reciprocity. On the other hand, the MAA, which is premised on the Model Law and the UNCITRAL Rules, is legislation dealing with the direct enforcement of arbitral awards. As such there is no actual conflict between the two. Rather it can be concluded that there subsist two separate avenues of enforcement;

(c) when comparing the REJA and the MAA, it is evident that the REJA, in dealing with the enforcement of judgments, including confirmation judgments, is premised on reciprocity. Reciprocity is a core aspect of international arbitration enforcement under the New York Convention. To that extent the REJA cannot be said to be a reflection of the general substantive position in law in relation to the enforcement of foreign judgments, including confirmation judgments. The general position in law requires a fresh action to be filed and prosecuted, premised on the foreign judgment, so as to obtain a judgment which is recognised, and therefore enforceable, in a domestic or national court. The REJA only

allows for enforcement of judgments including confirmation judgments in respect of specific jurisdictions thereby making it an exception rather than embodying the general position in law. It is therefore more correctly categorised as 'lex specialis' in itself. Similarly, the MAA is specifically geared under the MAA to deal with enforcement of arbitral awards. So it too, falls within the category of *lex specialis*;

(d) the defining difference between the two, ie the REJA and the MAA is that they both comprise separate avenues or modes of enforcement available for the enforcement of confirmation judgments premised on arbitral awards. To that end, it would be incorrect to even compare the two modes of enforcement as it would not be a comparison of *lex generalis* with *lex specialis.* It is in effect comparing two statutes that comprise *lex specialis* in themselves; and

(e) in the *travaux preparatoires* of the Model Law the drafters' express intention is to limit the Model Law's *lex specialis* status to matters stated in the Model Law. The reciprocal registration and enforcement of foreign judgments is not within the Model Law.

[152] It is pertinent in this context to have regard to the explanation given by the amicus curiae where he stated that the MAA cannot be described as *lex specialis* in relation to the enforcement of arbitral awards in Malaysia. He attributed this to the fact that *lex specialis* is a general principle which applies by and large to substantive law. Procedural rights like the enforcement of arbitral awards are generally available concurrently, may be non-exclusive and are not 'subsumed' by a specialist process. He further points to the fact that it is inappropriate to use *lex specialis* as a device to either displace or subject the REJA to the terms of the MAA. We accept the opinion and the analysis of the learned amicus curiae in this context.

Interdependent reading

[153] It is argued by the respondent that even if the REJA subsists as an alternative choice in terms of registering and enforcing a foreign arbitral judgment (vide a confirmation judgment), the choice of remedies doctrine, ie, the passive and active remedies open to an award debtor) is a fundamental feature of the Model Law and ought to be 'read into' the REJA. This is to ensure that the respondent is not barred from exercising the passive remedy of resisting the registration of a confirmation judgment. The basis for such a proposition is that the confirmation judgment is merely a procedural proceeding for enforcement in that jurisdiction, namely the UK. It is further contended that there was no determination afresh by the seat court on the issues of jurisdiction and fraud. If a confirmation judgment is not construed in such a manner, it would allow award creditors to utilise the REJA to bypass safeguards afforded to award debtors under the Model Law framework and would be 'contrary to

recognised principles of international arbitration law'. In essence the respondent's submission is that an award debtor is entitled to both an active and a passive remedy and that forcing an award debtor to go down the way of the REJA deprives the award debtor of defences it would have under the MAA (see *Dallah*), *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2013] SCD 275; [2014] 1 SLR 372 ('Astro') and *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 ('IMC Aviation')).

[154] The appellants maintain that there is no basis to submit that the REJA is subject to the MAA as the case law does not support the proposition that a judgment or award debtor can dictate when, where and how a judgment creditor is entitled to enforce an arbitral award. It further submits that the respondent is not limited to the passive remedy as the REJA itself provides for express statutory exceptions to enforcement of a foreign judgment.

[155] The Court of Appeal agreed with the respondent's interdependent interpretation of the REJA and the MAA in that it held that s 5 of the REJA ought to be read in light of the overarching framework for the enforcement of arbitral awards under the MAA. This would allow for the passive remedy available under the MAA to be available to an award debtor. As such even if the REJA was not impliedly repealed in relation to foreign confirmation judgments, its application had to be aligned with the principles underpinning the MAA/Model Law.

Our analysis on the point of an interdependent reading of the REJA and the MAA such that the REJA is made subject to the MAA

[156] Given our analysis above, we are of the considered view that it would be incorrect in law in construing these statutes, to subject the REJA to the terms of the MAA. This is because:

(a) REJA and the MAA are separate, disparate and distinct statutes which each take root from different bases such that they provide legitimate and discrete options for enforcement. There is neither conflict nor inconsistency between them warranting either being made subject to the other. Just as it would be inappropriate to use *lex specialis* as a device to subject the REJA to the MAA, it would equally be misplaced to subject the REJA to the terms of the MAA;

(b) both the REJA and the MAA are valid and legitimate modes of enforcement of a confirmation judgment and an arbitral award as they comprise subsisting legislation which has neither been amended nor repealed by Parliament. Both therefore afford legitimate bases for an award creditor to pursue its remedy of enforcement;

(c) REJA is a statute that signifies a special relationship of reciprocity which this jurisdiction enjoys with other specific jurisdictions only. It is limited to a few states only. To compel a reading or construction of the REJA to 'align' with that of the MAA would amount to importing specific provisions and the legislative intent of MAA premised on the Model Law, into the REJA, which is premised on reciprocity. The special relationship between the Schedule 1 countries and Malaysia would then become subject to policy considerations from a separate statute, which never comprised the basis for their reciprocal arrangements, which are expressed statutorily;

(d) the import of legislative intent from one statute to another (notwithstanding the fact that both are ultimately recognising and enforcing a confirmation judgment premised on an arbitral award and an arbitral award respectively) is not a satisfactory mode of statutory interpretation, as each statute is to be construed holistically and within its confines (see *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744; [2025] 4 CLJ 282 ('Swissray')). In *Swissray*, the court stated:

> The Correct Threshold Test
>
> [130] The starting point of our analysis is to give consideration to the legislation in relation to both arbitration and insolvency respectively in this jurisdiction in terms of the purpose, object and policy of the respective statutes, namely the AA and the CA.
>
> The Arbitration Act 2005
>
> [131] The short title of the AA states that it serves to reform the law relating to domestic arbitration, international arbitration, the recognition and enforcement of awards and for related matters. The Act is modelled on the UNCITRAL Model Law. It is a comprehensive and composite statute dealing wholly with the issue of arbitration, both domestic and foreign. The policy underlying the legislation is to ensure and facilitate arbitration agreements where the parties to the agreement have agreed that a dispute arising from their relationship is to be determined by arbitration. As stated in Redfern and Hunter, it is an effective way of obtaining a final and binding decision on a dispute or series of disputes without reference to a court of law.
>
> [132] In this context, it enforces a private, voluntary and consensual agreement between only the parties to the agreement. The legislation in this area serves to regulate the system of private justice both domestically and internationally. From an international perspective, arbitration is supported by international treaties and conventions which seek to link national laws together to weave a system of worldwide enforcement of both the arbitration agreements as well as enforcement of awards. These include the New York Convention of 1958, the UNCITRAL Arbitration Rules, and the UNCITRAL Model Law together with its revisions which forms the

'boilerplate' so to speak for arbitration in much of the common law world, at least.

[133] What is key to the arbitration legislation in our jurisdiction which mirrors the Model Law is that it envisages and deals with arbitration as taking place only between the parties who are party to the arbitration agreement. Enforcement of an arbitration agreement is similarly sought to ensure that parties comply or abide with their obligations under such agreement. To that end an international arbitration agreement is to be enforced on an international basis and not simply where the agreement was made. This may well explain the need to defer to arbitration, particularly on an international level, namely to ensure that parties comply with their obligations, contracted internationally and beyond their domestic borders.

[134] It should also be pointed out that a core feature of arbitration, whether domestic or international, as we understand it, neither envisages nor admits of its enforcement being effected such that it impinges or encroaches upon other third party rights, outside of the arbitration agreement. The legislative intent therefore is to enforce compliance by the parties to the arbitration agreement both domestically and internationally but does not extend beyond that. For example, the Act does not, by its provisions, purport to expand its reach to parties or matters outside of the arbitration agreement and proceedings commenced under such agreement. This is borne out by the definition of 'party' under the Act in s 2.

[135] In like manner, the Act does not purport to extend its application to other areas of the law such as insolvency, or admiralty for that matter.

> ... [the court discussed the law relating to winding up which is categorised under insolvency law in the Companies Act 2016] ...

[138] *The point sought to be made from the exposition on the completely different fields of arbitration and insolvency law is that the object, purpose and legislative intent underlying these two statutes are entirely dissimilar. Each statute is distinct and discrete.* As stated in *Sian*, it would not have been conceived that they would ever collide/clash, but the reality is that creditors who have entered into arbitration agreements may find themselves in a position where the opposing party, the debtor, is either genuinely insolvent, or that the creditor seeks to use the winding up procedure to enforce his claim expeditiously by circumventing the arbitration process. This latter application of the winding up process is clearly not the function for which the collective procedure was designed, and in so using the procedure, the creditor is effectively abusing the winding up process for a collateral purpose, unless the debt is unequivocally due and owing. Where there is a disputed debt, the winding up petition, as is the custom of the companies court, is stayed or dismissed. The creditor who sought to utilise this mode of enforcement is penalised in costs.

[139] *Therefore, the legislative intent or policy behind the two statutes is entirely disparate. As such, it should follow that the legislative intent underlying the AA should not be applied to the winding up provisions in the CA. Nor should the legislative intent of the latter be imported or applied in relation to the AA. There*

is no basis to warrant such utilisation or employ of the legislative intent of one in respect of the other.

[140] *Neither ought the provisions of either Act be engaged in the course of construing the other.*

[141] *Once this is accepted it follows that each Act should be construed within its own context and in line with its unique legislative intent (see s 17A of the Interpretation Acts 1948 and 1976). The purposive approach statutorily required there does not envisage the importation of either the provisions or legislative intent of unrelated statutes.*

...

[144] When a winding up petition is brought in the companies court, premised on the ground that the debtor is deemed insolvent under the CA for failing to meet a statutory demand, is the companies court adjudicating on a matter which is the subject of the arbitration agreement?

[145] The answer is no.

[146] The companies court is determining whether or not the debtor is insolvent so as to put into effect the collective and cooperative system pursuant to which there can be an orderly distribution of the assets to the creditors according to their entitlement on a *pari passu* basis. The companies court is not adjudicating on the dispute that comprises the subject matter of the arbitration agreement.

[147] As the companies court is not adjudicating on the 'matter' which comprises the subject matter of the arbitration agreement, but is examining and determining a different issue, namely whether the defendant company is insolvent or not, it is not justifiable to import either the statutory provisions or the legislative intent of the AA into the statutory provisions regulating winding up petitions under the CA.

[148] As stated at the outset of this analysis, *where the two acts are composite and distinct, they ought to be construed and applied within their respective contexts. It is also conventionally acknowledged and established that the importation of statutory provisions from one statute unrelated to, or distinct from another, is not tenable.*

[149] *Save for specific situations, an Act is meant to be construed in light of its own terms and not by the terms of another statute.* This rule of course does not affect reference to the legislative history of a provision or Act, which is not in issue in the present case.

[150] *It follows therefore that where statutory provisions are not to be applied interchangeably in separate and distinct statutes, then legislative intent too cannot be incorporated from one statute to another.* (Emphasis added.)

(e) in order for the REJA to be read interdependently with MAA such that the MAA imports legislative intent and makes the REJA subject to it, there must be clear legislative intent and express provisions which

exclude arbitral awards from s 2 of the REJA. This is evident for example in Australia where its equivalent of the REJA defines a judgment as excluding a confirmation judgment. Put another way it requires explicit revocation of the system of reciprocity established by the REJA. As no such amendment or revocation has been made it is not tenable to interpret the two statutes in such a manner;

(f) any such 'interdependent' reading, as pointed out by the amicus curiae will give rise to uncertainty in the REJA and to the principle of reciprocity. Under the REJA the reciprocating countries including the UK have similar reciprocal enforcement legislations. And these countries have not integrated the requirements of their international arbitration laws into their reciprocal enforcement of judgments legislation. The latter remain valid modes of enforcement of judgments. In the United Kingdom for example, certain foreign awards may be registered as an award in the High Court under, for example the Foreign Judgments (Reciprocal Enforcement) Act 1933 Part 1 provided they have become enforceable in the same manner as a judgment given by a court where the award was made (this is similar to the REJA); and

(g) if the REJA was read so as to be interdependent on the MAA, or more accurately, such that it is made subject to the MAA the courts would face challenges in reviewing decisions from competent reciprocal courts, complicating enforcement.

[157] In conclusion on this point, the REJA and the MAA are separate laws premised on their respective treaty arrangements, governing different rights. As such, the REJA cannot be construed so as to be subject to the MAA such that it overrides the MAA. The issue of conflict or inconsistency arising between the two statutes does not arise because they provide different modes of enforcement. It then follows that the passive remedy recognised and utilised in the setting aside of arbitral awards under the MAA cannot be read into the REJA. The REJA contains its own provisions allowing for the non-registration of a judgment including a confirmation judgment and these provisions govern such setting aside.

[158] In this context, we are unable to concur with the reasoning of the Court of Appeal that the respondent is entitled to utilise its 'passive' remedy under the MAA by reading such a provision into the REJA. In these circumstances, we are satisfied that the REJA is not subject to the MAA.

What is the effect of the judgment obtained by the appellants under s 66 of the United Kingdom Arbitration Act 1996? A

[159] For the appellants it is contended that the English judgment obtained under s 66 of the UK Arbitration Act 1996 is a final and conclusive judgment for the purposes of registration under the REJA. And this condition is satisfied because a judgment under s 66 is final and conclusive under the REJA in that it is final and conclusive between the parties. B

[160] For the respondent it is submitted that the English s 66 judgment is not a 'judgment on the merits' because the 'enforcement of awards under s 66 of the UK Arbitration Act is procedural in nature and does not involve a merits determination. In this context the respondent relies on the expert opinion of Lord Thomas of Cwmgiedd, whose report comprises a salient part of the cause papers. C D

[161] Lord Thomas opines that the party against whom the award is made ('award debtor') has a choice to either:

(a) bring a challenge in the courts of the seat of the arbitration ie the seat court. This is known as the active remedy; or E

(b) to wait for the award creditor to enforce the award against the award debtor. This is known as the passive remedy.

[162] Lord Thomas goes on to state, inter alia, that the English High Court judgment under s 66, the confirmation judgment, was 'plainly not a decision on the merits'. This, in turn, is because the s 66 judgment was made without the Commercial Court judge being asked to consider the issues raised in relation to the effect on the active and passive choices open to the respondent to resist enforcement (see para 34 of the opinion). F G

[163] The point made is that although the respondent did not challenge the arbitral award in the seat court under s 66 in the United Kingdom, this did not preclude the judgment debtor from having recourse to the 'passive' remedy at the court where enforcement was to be effected. In the instant appeal that would be Malaysia. However, such a passive remedy would only be available under the MAA in Malaysia. the REJA, being a discrete option available to an award creditor, functions on a completely different premise. H

[164] It is on this basis that the respondent contended that any attempt to treat the s 66 confirmation judgment as a judgment on the merits, would allow the appellants to circumvent or preclude the respondent from relying on its passive remedy, which is a remedy the respondent is entitled to exercise under the MAA. I

[165] Put another way, the application to register and enforce the judgment under the REJA, it is contended, amounts to a device by which the s 66 proceedings and judgment, amount to a final determination of the respondent's right to resist enforcement of the award, such that the passive remedy available under the Model Law is no longer available to the respondent. The use of the word 'device' suggests that the registration and enforcement in the UK was not a genuine bona fide attempt to enforce the judgment, but a means to deprive the respondent of the ability to challenge the issues of jurisdiction and fraud in the country of enforcement, ie this jurisdiction.

[166] To explain further, the expert opinion states that the term 'enforce as a judgment' means enforcement of the judgment within the jurisdiction. It does not encompass enforcement of an arbitral award as a judgment overseas, as the regime of the New York Convention is the regime for use for that purpose. In short, such a judgment cannot be relied on as enforcement for the purpose of the New York Convention. To clarify further it is explained that if the award debtor chooses to contest the application under s 66(1) and fails to succeed and the court nonetheless makes an order for enforcement, then the arbitration debtor may well be precluded from contesting enforcement elsewhere (see *Dallah*). However, that does not apply where the award creditor seeks to enforce the award in another jurisdiction and where there was no submission to jurisdiction in the UK.

[167] For the appellants the contrary view is expressed. They maintain that as pointed out in the expert report, a UK s 66 application is not an 'administrative rubber-stamping exercise'. Reliance is placed on the decision of the English Court of Appeal in *West Tankers Inc v Allianz SpA and another; The Front Comor* [2012] EWCA Civ 27 (CA) where it was stated that 'the court has to make a judicial determination whether it is appropriate to enter a judgment in terms of the award'. This, it was clarified by Toulson LJ, could be ascertained by inquiring and determining whether there are issues militating against the validity of the award or 'some other reason the court might not be persuaded that the interests of justice favoured the order being made'. Reference was also made to the case of *Sodzawiczny v McNally* [2021] EWHC 3384 (Comm) which emphasised the need for an independent judicial determination of the propriety of a s 66(1) application for registration and enforcement.

[168] In essence the appellants contend that the registering of a s 66 judgment does require the court to undertake the exercise of ascertaining that it is a valid judgment that ought to be so registered so as to become enforceable in the UK as it has the same characteristics as any other judgment of the court (see *Sonatrach v Statoil* [2014] EWHC 875 (Comm)). As such it is a final judgment and the arbitral debtor is precluded from challenging the award

when the award creditor seeks to enforce it, even in this jurisdiction. A

[169] These competing positions in law are further complicated by the fact that this is not a situation where an arbitral award is sought to be enforced under the MAA utilising the Model Law regime. Here an ancillary or confirmation judgment premised on a foreign arbitral award obtained pursuant to s 66 of the English Arbitration Act is sought to be registered and enforced as a judgment under the REJA which is based on reciprocity. B

[170] This brings to the fore several matters: C

What is the effect of a UK s 66 confirmation judgment in the context of the REJA?

[171] In the instant appeal both the arbitral tribunal and the English High Court decided consistently that the award creditor prevailed. There is therefore, for the purposes of this jurisdiction, a *foreign s 66 judgment* in existence which upholds the validity of a foreign arbitral award. D

[172] If the award creditor seeks recognition and enforcement under the REJA in a Malaysian Court, what factors should guide the decision of the court in this jurisdiction? The answer would be the statutory provisions set out in the REJA itself, including the provisions available for setting aside such registration, under s 5. E F

[173] As we have concluded that the REJA and the MAA provide two discrete and legitimate avenues for the enforcement of confirmation judgments and foreign arbitral awards, it follows that the confirmation judgment the appellants obtained under s 66 of the English Arbitration Act can be registered and enforced under the REJA. G

[174] Secondly, as we have concluded that the REJA is neither overridden nor impliedly repealed by the MAA, the provisions of the REJA will apply in adjudicating on the registration and enforceability of the confirmation judgment. H

[175] Thirdly, as there is no interdependent reading of these statutes, it follows that the MAA cannot be read into the REJA so as to allow the provisions of the MAA to prevail over the REJA. Neither does it make the REJA subject to the provisions of the MAA when adjudicating on the setting aside of foreign confirmation judgments premised on arbitral awards. As explained earlier, this is because of the definition in s 2 of the REJA which includes specifically, foreign arbitral awards which have been registered and are I

enforceable in the seat country, where the seat countries comprise a part of Schedule 1 of the REJA.

How is the award debtor or judgment debtor affected by the registration of the confirmation judgment under the REJA? What are the options available to the judgment debtor under the REJA?

[176] The next issue that arises for consideration is how the award debtor, now the confirmation judgment debtor, may challenge the arbitral award when it is sought to be enforced by the award creditor or judgment creditor in the foreign jurisdiction, namely Malaysia. Is the foreign enforcing court restricted to reviewing solely the confirmation judgment or does the scope of its review extend to the arbitral award underlying the confirmation judgment?

[177] As stated at the outset 'judgment' s 2 of the REJA is defined as:

> ... except in relation to a country or territory outside the Commonwealth, *includes an award in proceedings in an arbitration if the award has*, pursuant to the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place; ...

[178] As such, foreign arbitral awards from the countries specified in Schedule 1, in the form of confirmation judgments may be registered and enforced. A confirmation judgment, while not a rubber-stamping exercise, is essentially ancillary to the arbitral award which reflects the actual adjudication of the dispute on its merits between the parties. The confirmation judgment allows for the arbitral award to become enforceable, such that the fruits of the arbitration adjudication may be enjoyed by the award creditor, where it succeeds on its claim.

[179] Section 5 of the REJA allows the judgment debtor to set aside the judgment if any one of the six separate issues stipulated there is made out. This includes instances where the courts of the original court did not have jurisdiction or where the judgment was obtained by fraud. The key question is whether the foreign arbitral award may be reviewed for the purposes of assessing these issues, or whether the judgment debtor is restricted to dealing solely with the confirmation judgment.

Section 5 of the REJA — Confirmation judgment or underlying award?

[180] In our considered view, any real adjudication of the six matters set out in s 5 of the REJA in the case of a confirmation judgment premised on a foreign arbitral award, should allow for an examination or review of these issues in relation to the arbitral award, and not be confined solely to the confirmation judgment. The latter approach would not allow any real form of examination

of these issues. A restriction to that effect would deprive the award or judgment debtor of real defences it may wish to raise, so as to form the basis for a setting aside of the confirmation judgment. The confirmation judgment is premised entirely on the arbitral award. And its inclusion in the REJA is to enable the registration of foreign arbitral awards under the principles of reciprocity. Therefore, a restriction to solely a review of the confirmation judgment may well be insufficient, as the legislative intent of the REJA in its inclusion of foreign arbitral awards in the form of confirmation judgments, would suggest that the arbitral awards that underly and form the basis for confirmation judgments may also be scrutinised. Therefore, based on a purposive construction of the provisions of ss 2 and 5 of the REJA we find that the defences in s 5 should be construed and applied in relation to the award as well as the confirmation judgment.

[181] The text of s 2 defining 'judgment' supports this conclusion as well. A judgment that is registrable under the REJA is said to 'include[s] an award in proceedings in an arbitration' if it has become 'enforceable in the same manner as a judgment given by a court in that place'. It is the award that is treated as a judgment as defined in the REJA, not the confirmation judgment.

[182] In other words, the confirmation judgment makes the arbitral award eligible to be registered under the REJA. It is a condition precedent to the arbitral award falling under the REJA but it is nevertheless the arbitral award itself that is registered as a judgment pursuant to the REJA.

[183] Imagine for instance the UK passes a law that holds that an arbitral award is automatically enforceable, in the UK, in the same manner as a judgment, without any court proceedings. There is no reason that award should not be registrable under the REJA as a judgment as it has become 'enforceable in the same manner as a judgment given by a court in that place'; therefore, such an award would fulfill the criteria in s 2 of the REJA.

[184] The definition's phrasing, 'includes an award', cannot be read as referring to a confirmation judgment. If that were the case, the Legislature would have used explicit language (eg, 'a judgment enforcing an award'). The deliberate focus on the award itself (once enforceable as a judgment) indicates that the arbitral award, not the confirmation judgment, is what the REJA assimilates into the definition of 'judgment'.

[185] This reading avoids redundancy: the phrase 'an award' has independent meaning because it is the award's legal status as being enforceable as a judgment that triggers the REJA's application, not the existence of a separate confirmation judgment. By contrast, interpreting 'an award' as merely denoting confirmation judgments would render the phrase superfluous, as the

definition could have simply referred to 'judgments' generally (with no need to mention awards at all). The principle against surplusage thus demands giving the phrase 'an award' operative effect as the thing that is registered (*Ketua Pengarah Dalam Negeri v Kind Action (M) Sdn Bhd* [2025] MLJU 672, [46]).

[186] We are conscious of the fact that the respondent did not raise these issues in the course of the s 66 UK proceedings registering the award as an enforceable judgment in the UK. But as pointed out earlier, that does not constrain the respondent from raising these issues under the REJA as they are statutorily provided for.

[187] It is therefore open to the respondent to raise the several defences set out in s 5 of the REJA in relation to the original arbitral award in the form of the confirmation judgment. As such, the respondent cannot be said to be deprived of recourse to defences to oppose the registration and enforcement of the confirmation judgment.

The effect of the confirmation judgment on the arbitral award

[188] Additionally, this issue of whether it is solely the confirmation judgment or also the original arbitral award that may be scrutinised, can also be answered by *an analysis of the effect of the confirmation judgment on the arbitral award.* This is because there are several possibilities or theories that arise for consideration when an arbitral award is registered for purposes of enforcement in the seat court.

[189] When such a confirmation judgment is obtained:

(a) do the confirmation judgment and the arbitral award remain separate, such that each allows for a separate and discrete enforcement path? or

(b) does the arbitral award merge with the judgment, such that the arbitral award no longer subsists, and only the judgment remains? or

(c) does the award merge with the judgment, but only to a limited extent — within the seat country but not extraterritorially?

[190] Why does this issue warrant consideration? This is because each of the three approaches determines the extent to which the enforcing court may review the confirmation judgment and the arbitral award. This in turn will determine the ease with which the judgment creditor or award winner may enforce the award, and conversely, for the judgment debtor, circumscribe the extent to which the arbitral award may be subject to curial scrutiny.

The three theories relating to the interaction between arbitral awards and confirmation judgments

[191] The first theory or possibility is that the arbitral award merges with, or into the confirmation judgment, such that the arbitral award no longer subsists separately. As a consequence of this merger, the judgment replaces the arbitral award, and is the only means of enforcement available. The award is effectively nullified. *This is known as the extraterritorial merger approach.* The consequence of this approach is that there can only be a review of the judgment and not the arbitral award. The avenues available to the judgment debtor to raise defences will be limited.

[192] The second view is that the merger of the arbitral award and the confirmation judgment occurs only within the rendering or registering state and has no extraterritorial effect. This is known as the 'limited-in-scope' merger theory. The award creditor can execute the confirmation judgment for purposes of execution within the seat country or rendering state, but could pursue recognition and enforcement of the arbitral award, if seeking to recover outside of that country. *In other words, the arbitral award does not merge into the judgment outside of the jurisdiction of the seat country.* The arbitral award remains available to be enforced separately once outside of the jurisdiction of the seat country, as far as the award creditor is concerned. It would also be open to the award debtor to set aside the arbitral award in the country of enforcement. Such an approach could be undertaken by either party under the MAA.

[193] But what is the position where the award creditor chooses to proceed under the REJA?

[194] *As stated earlier, there subsist two separate and discrete modes of enforcement available to the award creditor, either to proceed*:

(a) under the MAA, which is the preferred route in the majority of cases; or

(b) under the REJA, which also expressly confers jurisdiction by reason of its inclusion of arbitral awards from the Commonwealth which have been converted to confirmation judgments on the basis of reciprocity.

[195] To this extent the *limited in scope merger* theory allows for enforcement of the arbitral award under the MAA as well as the REJA.

[196] And the third view, common in the United States, is where the *foreign confirmation judgment is considered to be a separate and distinct claim from the arbitral award upon which it is based.* Under this theory, the confirmation judgment and arbitral award create a parallel entitlement, by which the award creditor may proceed with enforcement against the confirmation judgment, or

the arbitral award. *This is known as the parallel entitlement theory.*

The appellants' approach

[197] The appellants submit that it is the parallel entitlement approach that prevails and ought to be followed. It gives the party that prevailed in the arbitration two avenues through which to pursue relief. Either through the Model Law or under specific statutory provisions for recognising foreign judgments in the enforcing state. The arbitral award and the confirmation judgment are seen as separate and distinct, such that the award creditor may choose to enforce either the arbitral award or the judgment as it sees fit.

[198] The adoption of this approach began with the Second Circuit Court of Appeals decision in *Island Territory of Curacao v Solitron Devices Inc* 356 F Supp 1 (SD NY 1973) [1973] (CA) ('Solitron') where the award creditor obtained an award in Curacao which was then enforced as a judgment in the Curacao courts. The award creditor who was now a judgment creditor sought to enforce the Curacao judgment in the State of New York under the latter's civil procedural regime for the recognition and enforcement of foreign money judgments. This was allowed, the reasoning being that the New York Convention would only apply in respect of arbitral awards and does not bar 'the enforcement of foreign judgments confirming arbitral awards'.

[199] Similarly, in *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co, Kommanditgesellschaft v Navimpex Centrala Navala* 29 F3d 79 (2d Cir 1994) the question of enforcing a confirmation judgment ie a foreign judgment based on an arbitral award arose again in the Second Circuit Court of Appeals. The award creditor sought to enforce both the ICC Award under the New York Convention and the French judgment in the State of New York. The enforcement of the ICC award was refused as it was time-barred, while the French judgment was both recognised and enforced.

[200] And in *Ocean Warehousing BV v Baron Metals and Alloy* 157 F Supp 2d 245 (SDNY) 2001 (DC) ('Ocean Warehousing') the judgment creditor commenced registration proceedings in respect of a foreign judgment granted by the District Court of Rotterdam, ie a Dutch judgment which enforced and confirmed an arbitral award in the Netherlands. During the registration proceedings the judgment debtor opposed the registration of the Dutch judgment on the grounds that registering the Dutch judgment would prevent the judgment debtor from raising and/or relying upon a New York Convention defence, namely that the arbitration agreement was not valid. The judgment debtor's application to oppose the registration was dismissed by the court, as the court found that the defences under the New York Convention did not apply to proceedings on a foreign judgment. It was observed that the court, in

determining whether to recognise a foreign judgment, was governed by its rules and the principle of comity. This applied to confirmation judgments.

[201] Based on the foregoing case law the appellants submit that the appropriate approach to be undertaken by this court in dealing with the registration of a confirmation judgment is to apply the parallel entitlement mode. Such a mode works on the basis that once an award creditor has enforced the award within the seat jurisdiction as a judgment of the seat court, then *that confirmation judgment can be enforced or set aside within the seat jurisdiction only*. The award debtor is precluded from challenging the validity and merits of the confirmation judgment as it failed to do so within the seat jurisdiction. In other words, the respondent is precluded from challenging the confirmation judgment in the enforcing court on the merits of the arbitral adjudication under the MAA, in light of its failure to challenge the registration and enforcement of the confirmation judgment under s 66 of the UK Arbitration Act 1996. The confirmation judgment is effectively binding on the respondent.

Parallel entitlement approach and the REJA

[202] The parallel entitlement approach advocated by the appellants does not appear to take into account the effect of s 5 of the REJA which does allow the enforcing court to undertake a review of specified matters as set out in s 5. The key question that arises is whether the enforcing court under the REJA assesses and reviews the arbitral award or the confirmation judgment alone. As stated earlier, this will turn on *whether the arbitral award has merged or remains distinct from the confirmation judgment.*

The respondent's approach

[203] The respondent as stated earlier opposes the parallel entitlement approach. It maintains that in the course of the enforcement of a foreign arbitral award, albeit in the form of a confirmation judgment, the sole and only route available to an award creditor is under the MAA. Any other form of enforcement, such as under the REJA, it contends, would preclude the respondent from raising defences available to it under the MAA — meaning the New York Convention defences that allow the foreign enforcing court ie Malaysia in this case, to undertake a review of the issues of jurisdiction and fraud in the manner outlined under the MAA. This would, following *Dallah* and *Astro*, allow the respondent to fully ventilate its 'passive' remedy which it is entitled to canvass, notwithstanding its non-action in relation to the confirmation judgment.

[204] In adopting this approach, the respondent gives effect to the limited in

A scope merger doctrine in that it maintains that the s 66 UK confirmation judgment only has the effect of precluding any form of 'passive' remedy within the UK. Extraterritorially, it has no such effect and the respondent remains at liberty to raise its passive remedy — in this instance of a lack of jurisdiction and fraud, vide the MAA. But not through the REJA, which it maintains, as we saw B earlier, is either impliedly repealed, or has to be read subject to the MAA, such that the MAA/Model Law regime prevails, providing a single source of entry for the registering and enforcement of foreign arbitral awards.

C Our analysis of the differences between the approaches adopted by the appellants and the respondent

[205] Where the respondent differs from the appellants is in relation to the appropriate theory applicable to the facts of this case, as well as the choice of D remedies available to the appellants as award creditors. The use of the REJA, the respondent submits, is a tactic calculated to divert and preclude the respondent from exercising its entitlement to raise certain defences. The MAA is therefore the sole mode of registering and enforcing arbitral awards.

E **[206]** Put another way, it is submitted for the respondent that the REJA, notwithstanding its definition section, should not be utilised to register and enforce arbitral awards. In effect, the respondent's argument is that there can be no parallel entitlement as that would defeat the policy and purpose of the MAA which is the sole basis on which foreign arbitral awards are to be recognised and F enforced in this jurisdiction.

[207] We are of the view that there are two aspects to this issue raised by the parties. Firstly, we reject the respondent's contention that there can only be a single mode or avenue of enforcing an arbitral award in the form of a G confirmation judgment in this jurisdiction. This is because Parliament in this jurisdiction has determined that an arbitral award in the form of a confirmation judgment may be registered and enforced in respect of a limited number of countries as specified in Schedule 1, which comprise part of the Commonwealth. As such, this form of enforcement cannot be ignored, nor H integrated into the MAA, so as to become subject to it. It is not for an award debtor to dictate to an award creditor precisely how it is to enforce the arbitral award, particularly when there are two or more alternative modes of enforcement available to it within the jurisdiction, as is the case here.

I **[208]** However, we accept that the *limited in scope merger doctrine* effectively espoused by the respondent and examined above, is the preferred approach to be taken in determining how the foreign arbitral award is to be assessed and reviewed in the enforcing country. Such an approach, while providing for the merger of the award in the judgment within the rendering state or seat country,

does not operate extraterritorially. We concur with, and accept the expert opinion of Lord Thomas in this regard.

[209] This in turn means that the arbitral award and the confirmation judgment remain separate and discrete within the foreign enforcing court, such that the arbitral award may be reviewed. The nature of such review will depend on the statute or avenue available in the enforcing jurisdiction chosen by either the arbitral creditor or the arbitral debtor. The mode of review under the MAA for example will differ from that prescribed under the REJA (as we determined earlier, the arbitral award may be assessed for the purposes of the REJA).

The parallel entitlement approach

[210] We turn to the parallel entitlement approach advocated by the appellants. It appears to us that the parallel entitlement approach does not afford an answer to the REJA and MAA conundrum underlying the present appeal. This is because with the parallel entitlement approach, the enforcement of both the confirmation judgment, as well as the original arbitral award may be undertaken separately and successfully.

[211] In the instant appeal however we have construed 'judgment' for the purposes of enforcement under the REJA in line with s 2, which allows for, and prescribes the *criteria for the enforcement of a foreign arbitral award in the form of a confirmation judgment.* This means that the court under the REJA can undertake an assessment of the *arbitral award under s 5, and not solely the confirmation judgment.*

[212] *As such, in relation to the REJA, the enforcement of the confirmation judgment separately from the arbitral award does not come into play, warranting the application of the parallel entitlement approach. Rather it is a question of whether the REJA can be utilised to enforce an arbitral award in the form of a confirmation judgment, when the MAA subsists.*

[213] This in turn brings into play the following salient issues:

(a) whether the arbitral award can be enforced through the REJA as opposed to the MAA; and if so,

(b) the extent of the scrutiny available under the REJA.

[214] This is not a case where the arbitral award and the confirmation judgment are sought to be enforced separately under the MAA as well as the REJA, where the parallel entitlement approach may be warranted. We reiterate that *this is a case where the confirmation judgment predicated on the arbitral award is sought to be registered and enforced under solely the REJA*. As such there

is no separate enforcement of the confirmation judgment as a judgment under the REJA and separately an enforcement of the arbitral award under the MAA.

The problems with the parallel entitlement approach

[215] The adoption of the parallel entitlement approach *in toto* as the theory is strictly practised, may well allow for the circumvention of certain key matters of some importance. For the purposes of the instant appeal, if the parallel entitlement approach is applied, it would mean that the confirmation judgment only, can be enforced in full, without regard to the content of the arbitral award on which the judgment is based.

[216] Such an approach could possibly mean, for purposes of the REJA, that the judgment debtor would be confined to the terms of the confirmation judgment only, without recourse to the arbitral award, which is separate and discrete. In such a circumstance, the judgment debtor may well be precluded from asserting certain deficiencies in the arbitral award, or defences otherwise available to it in relation to the arbitral award, *under article V of the New York Convention*.

[217] In Malaysia, the REJA vide s 5, mirrors the article V defences available for arbitral awards under the New York Convention, for the registration of foreign judgments in specified Commonwealth countries only, on the basis of reciprocity. As such, both foreign judgments as well as arbitral awards in the form of confirmation judgments may be set aside on the basis of a failure to satisfy s 5. This incorporation of the article V defences, allows the judgment debtor or award debtor to raise these defences freely.

[218] This is all the more so, given that we have concluded above that the court, in considering whether to set aside or allow the registration of a confirmation judgment, may look to the foreign arbitral award itself, to determine whether the matters set out in s 5 have been made out.

[219] Section 5 of the REJA balances the rights of the debtor who is entitled to ventilate such defences (as recognised under the New York Convention in relation to the enforcement of arbitral awards) against the rights of the arbitral creditor in its pro-arbitration stance that comprises the other pillar of the New York Convention. The REJA, as it is structured, therefore precludes a judgment creditor from enjoying any tactical advantage that might accrue if such defences were not available to the confirmation judgment debtor. To that end, the confirmation judgment debtor, such as the respondent here, is not deprived of the ability to raise the defences of jurisdiction and fraud within the context of s 5 of the REJA.

[220] It must be said that this is not identical to s 37 of the MAA. Nonetheless, it allows the respondent to raise the six core and salient matters that go to the heart of the validity of an arbitral award. To that extent it cannot be said that the respondent is 'deprived' of a remedy — be it an active or a passive remedy.

The limited in scope merger approach

[221] It is in this context that the limited in scope merger approach comes into play to most adequately explain how both the REJA and the MAA provide two disparate yet holistic avenues for the registration and enforcement of foreign arbitral awards. The utilisation of this doctrine means that once the award creditor has enforced the award within the seat jurisdiction as a judgment of the court, the award does merge with the judgment (where no application to set aside is either made or is successful). However, this is only so within the seat jurisdiction. And it is only within the seat jurisdiction that the judgment can be enforced or set aside (see *Ashapura Minechem Ltd v Armada (Singapore) Pte Ltd* [2018] EWHC 3056 (Comm) ('Ashapura')). In *Ashapura* it was held:

> 23. The basis of claim under section 72, says ASPL, is a challenge which relates to an award, and it pertains to declarations that awards are invalid, ineffective and not binding. ASPL submits to me that the awards do not exist, so section 72 effectively cannot bite. They direct me to the judgment of Lord Hobhouse, in *Associated Electric and Gas Insurance Services v European Reinsurance Co of Zurich* [2003] 1 WLR 1041, where he said:
>
> > It is an implied term of an arbitration agreement that the parties agreed to perform an award, so the award creates new rights between the parties which supersede previous rights. Those rights are contractual and give rise to a cause of action.
>
> 24. However, when judgment is entered, say ASPL, under section 66.2, the cause of action created by the award merges in the judgment. They have referred me to the textbook on arbitration known as Russell on Arbitration, paragraph 8–008. That effectively echos what is said in more general law, and there is verified authority for this. Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46; [2014] AC 160 at 17 explained this:
>
> > The doctrine of merger which treats a cause of action as extinguished once judgment has been given on it and the claimant's sole right is being a right on the judgment. Although this produces the same effect as the second principle [to which he had previously referred], it is in reality a substantive law about the legal effect of an English judgment which is regarded of a higher nature and therefore as superseding the underlying cause of action.
>
> 25. ASPL therefore say that, based on that authority as to the structure of how right of action on an award works and how it then becomes merged in a judgment once a judgment is obtained, the awards are merged in the judgments of Teare J dated

16 February 2016, and there is no right which could be raised under section 72.

26. Having considered this submission and looked at the authorities, that submission seems to me to be perfectly correct. It is, as I have noted, supported by the highest and recent authority of Lord Sumption in *Virgin Atlantic Airways* explaining the nature of merger on judgment. Accordingly, in my judgment, the application under section 72 falls at the first fence.

...

28. Next is the application to set aside. The argument of ASPL is, as I have explained, if Ashapura had wished to bring an application under section 72, what they would have needed to do is also make an application to set aside the judgment of Teare J and to set aside the order of Cooke J made under the Act. That effectively is reliant on the same underpinning of law which I have just explained; that effectively the nature of the right in relation to the arbitration award is different.

29. Paragraph 3 of the order of Cooke J provided that the defendant had the right to apply to set aside the order within 23 days of service of it. As I have said, the order was served pursuant to CPR 62.18 (7) and (8), and that was on 24 March 2010. Accordingly, any application to set aside the order was required to be made by 16 April 2010, and no application has ever been made to set the order aside.

[222] However, there is no such merger of the judgment extraterritorially. This means that when the award creditor seeks to enforce the judgment outside of the seat country, it may choose to enforce the arbitral award or the confirmation judgment (if it is able to under the REJA) because extraterritorially, there is no merger of the award into the judgment. For the purposes of the REJA, the foreign arbitral award is recognised as a judgment which is made enforceable by reason of the existence of the confirmation judgment.

[223] In the parallel entitlement cases set out above from the United States, where the arbitral award and the confirmation judgment are enforced separately, the judgment debtor challenging the enforcement of the confirmation judgment is on a backfoot, so to speak, as the article V defences or other defences may not be available to it. However, in the instant appeal, as explained above, the *article V defences for arbitral awards* are mirrored in the REJA. This is a fundamental difference which goes to the root of the ability of an award debtor or a judgment debtor to challenge or defend enforcement in a different jurisdiction due to the statutory defences afforded, albeit under the principles of reciprocity.

[224] Given the existence of s 5, we are not convinced that the judgment debtor in a parallel entitlement case like *Ocean Warehousing* for example, can be equated with the respondent in the instant appeal who can defend the appellants' enforcement of the arbitral award in the form of a confirmation judgment under the REJA. It is for this reason that we are not convinced that

the parallel entitlement approach as practised in the United States is the ideal approach to be applied in the instant appeal.

[225] Further, by reason of the application of the limited in scope merger approach, the fact that the respondent did not defend the s 66 proceedings in the UK does not deprive it of the defences available to it under the REJA. This again is a different conclusion to that arrived in *Ocean Warehousing* where the fact that the judgment debtor was accorded an opportunity to defend the enforcement in litigation in the seat country was held against it.

[226] While this factor of the non-defence of the s 66 UK judgment by the respondent may well be a relevant factor for consideration in any ultimate decision relating to the registering of a confirmation judgment under the REJA, the decision not to defend the registration of the judgment under s 66 does not, of itself, preclude the respondent from relying on the available statutory defences outlined in the REJA.

[227] Here, the REJA allows for those defences set out in s 5 to be utilised by the judgment debtor, and that statutory position must prevail. The net result is that the respondent is able to defend itself against the enforcement of the arbitral award in the form of a confirmation judgment. While these defences are not identical to those under s 37 of the MAA, that does not detract from the fact that the award or judgment debtor may avail itself of such defences. As such, the respondent is effectively accorded an opportunity to be heard in its defence by way of specific statute-based defences.

Extent of scrutiny under s 5 of the REJA

[228] In the instant case both jurisdiction and fraud may be raised under s 5 of the REJA by the respondent in an application to set aside the registration of the confirmation judgment. This brings to the fore the question of the extent to which the award debtor or judgment debtor may seek to review the foreign award, now a confirmation judgment. In other words, the grounds of a lack of jurisdiction and fraud remain open to scrutiny under s 5 of the REJA.

[229] Before moving on to consider whether the defences put forward by the respondent to the REJA application are jurisdictional challenges and the scope of scrutiny an enforcing court undertakes in such a situation, there is one final matter which requires addressing in relation to the confirmation judgment obtained by the appellants in the UK which they seek to enforce in Malaysia under the REJA.

Does the application under the REJA made by the appellants amount to 'judgment laundering' as described in S*trategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence* [2021] 4 All ER 189; [2020] EWCA Civ 1604; [2021] 2 WLR 448 ('Strategic')

[230] The answer to this question will determine whether the application by the appellants amounts to a tactical device known as 'judgment laundering' in an attempt to register a 'judgment on a judgment' utilising the REJA. In other words, the suggestion is that the REJA is being improperly utilised to judgment launder the confirmation judgment in Malaysia. The basis for this submission is the expert report obtained on behalf of the respondent, which relies on the decision in *Strategic*.

[231] In *Strategic*, the claimant had obtained a default judgment in 1999 in the High Court of Singapore against the defendant. The defendant in that case was held to have submitted to the jurisdiction of Singapore and damages were assessed in 2002. In 2009 the claimant obtained a default judgment on the basis of the Singapore judgment in the Grand Court of Cayman Islands against the defendant, which was also held to have submitted to that jurisdiction. The claimant then registered the Cayman Islands judgment in the High Court of England and Wales under s 9 of the AJA 1920. On appeal, the issue before the English Court of Appeal was *whether a judgment on a judgment could be registered under s 9 of the AJA 1920.*

[232] It was held that a judgment of the Grand Court of the Cayman Islands on a judgment, ie the judgment of the High Court of Singapore, might well fall within the literal reading of the relevant section of the AJA 1920 (the equivalent to the REJA, save that the REJA is premised in substance on the English 1933 Act. The 1920 Act is still applicable in the UK for post-colonial jurisdictions and allows for far greater scrutiny and review than the countries listed under the 1933 Act).

[233] However, it was incorrect to construe the section literally rather than purposively and in accordance with the scheme of the legislation. It was then concluded that a judgment on a judgment was *not* a judgment that was registrable and enforceable under the 1920 Act.

[234] The reasoning on the particular facts of that case as stated by Males LJ at para 55 was that a literal reading would mean that a judgment given in a state with which there were no reciprocal arrangements and which was not in the Commonwealth could be registered for enforcement in the UK by an action to enforce that judgment in an intermediate state to which the 1920 Act applied. That was described as 'judgment laundering'.

[235] Having considered this issue in terms of the peculiar facts in *Strategic*, we are not persuaded that the appellants' actions in seeking to have the arbitral award registered and rendered enforceable in the UK under s 66 of the English Arbitration Act and then seeking to have the English judgment registered under the REJA, amounts to judgment laundering.

[236] To amount to judgment laundering would mean construing the seeking of the registration of a foreign confirmation judgment on an award under the REJA as amounting to judgment laundering. This is because the facts in *Strategic* differ considerably from the present factual matrix. In that case the first judgment was from Singapore while the judgment laundering aspect of the case, ie the judgment upon a judgment was from the Grand Court of the Cayman Islands. There were in effect two separate judgments before the second judgment was sought to be enforced in the English Courts.

[237] That is not the case here, where there is an English arbitral award confirmed as a judgment under English legislation and which is sought to be enforced in Malaysia under the REJA which is premised on reciprocity. It is ultimately an English award which is specifically recognised as being registrable under the REJA in the form of a confirmation judgment, which can only be obtained by registering the judgment under English arbitral law.

[238] There is no question of the English arbitral award which was converted to a confirmation judgment under s 66, then being sought to be enforced in a second country, before being registered in the Malaysian courts. Here it is a London arbitral award controlled by the *lex arbitri* which is English law subject to the governance of the English jurisdiction. Judgment laundering would involve a foreign judgment being 'laundered' in a jurisdiction first, before being passed off at the enforcement court for recognition and enforcement. That is not the case here, as there is only one court and one judgment involved.

[239] Crucially, Males LJ explained that the reason judgment laundering is so pernicious is that it would allow a party to take advantage of reciprocal arrangements to which it was not actually entitled, thereby undermining the principle of reciprocity (*Strategic*, [56]). In the present case, it would undermine the principle of reciprocity not to allow an arbitral award registered in a jurisdiction with which we have reciprocal arrangements, namely the UK, to be registered in Malaysia under the REJA, which gives effect to such reciprocity.

[240] Secondly, reliance was placed on Males LJ's judgment in *Strategic* at paras 58 and 59 which made it clear that the AJA 1920 'contemplates two stages namely proceedings in the court leading to a judgment on the merits of

A the underlying dispute and the proceedings in England for registration of that judgment, and not three stages also involving an intermediate court'.

[241] Further the judgment explains that Parliament is unlikely to have had the possibility of the enforcement of a judgment on a judgment, in that it would have contemplated that the original court whose judgment it was sought to register, would be the same court which had dealt with the underlying dispute, not an intermediate court such as the Cayman Islands court. To fall within the tactical device of judgment laundering, it would require the LMAA arbitral award to be read as the first 'judgment', followed by the s 66 confirmation as the judgment of an intermediate court before seeking registration under the REJA as amounting to judgment laundering, which is not the case here.

[242] Indeed, this reasoning is actually in alignment with this court's. As explained earlier, it is the arbitral award, which is effectively the judgment on the underlying dispute, that is supposed to be examined under the REJA. Therefore, Males LJ's suggestion that it must be the judgment on the underlying dispute that is registered is indeed what is being done.

[243] In any case, on the issue of the application of the relevant provisions of the AJA 1920, and whether a s 66 judgment amounts to a review of the judgment on its merits, it is worth reiterating that the s 66 English judgment is not a rubber-stamping exercise. As stated by Toulson LJ in *West Tankers*:

> ... the court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the award.

[244] In *Sodzawiczny* the independent judicial determination of the propriety of a s 66(1) UK judgment was emphasised by the English High Court which pointed out that enforcement may be denied where the matter is non-arbitrable. This establishes that judicial scrutiny is undertaken on registration under such an application.

[245] Further, as stated earlier, there is no equivalent provision to the English s 9(2)(f) of the AJA 1920 within the REJA in Malaysia. The AJA 1920 requires scrutiny to ensure that the judgment did not fall foul of public policy or 'for some other reason could not have been entertained by the registering court', in which event the judgment would not be registered. This allows for a broad power of review and scrutiny under the AJA 1920 which as stated earlier is largely for post-colonial states. It is different from the English 1933 Act which provides for a far narrower scrutiny.

[246] However, under the REJA there are stipulated bases, similar to that in

the English 1933 Act, on which a foreign judgment can be set aside or not allowed registration as set out in s 5. There is n either room n or statutory provision that allows for a broad and roving power to scrutinise or review the underlying cause of action of the foreign judgment. The subject matter of the defence has to fall within the purview of s 5 of the REJA.

[247] And the fact that confirmation judgments premised on arbitral awards from Commonwealth countries can be registered so as to be enforceable under the AJA 1920 is borne out by the case of *LR Avionics Technologies Ltd v Federal Republic of Nigeria and another* [2016] 4 WLR 120. There the claimant obtained leave from a Nigerian High Court to enforce an arbitral award in Nigeria in the same manner as a judgment. The claimant then applied to an English High Court to enforce the Nigerian judgment under s 101 of the UK Arbitration Act 1996 and s 9 of the AJA 1920. Males J (as he then was) held that the judgment could not be recognised nor enforced under s 101 of the English Arbitration Act because It was a judgment and not an award. However, he proceeded to enforce the Nigerian judgment pursuant to s 9 of the AJA 1920 on the basis that the award had been converted to a judgment 'under a foreign statutory provision *equivalent to section 66 of the Arbitration Act 1996*'. (Emphasis added.)

[248] In the Singapore case of *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2008] SGCA 48 ('Westacre'), the Singapore Court of Appeal allowed the registration of an English judgment enforcing a Swiss arbitral award under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (Singapore).

[249] Therefore, it is clear that the REJA provides a clear and separate avenue for enforcement of an arbitral award such that an English arbitral award registered as a confirmation judgment may be sought to be registered under the REJA. Alternatively, the foreign arbitral award may be sought to be registered for enforcement under the MAA. The former avenue, ie the use of the REJA, does not make it 'judgment laundering'.

[250] We now move on to consider the next question relating to the issue of the respondent's jurisdictional challenge premised on fraud.

Issue 4: Is a challenge predicated on factual findings of fraud a jurisdictional challenge?

Issue 5: What is the approach to be taken by the registering court under the REJA? What is the extent of scrutiny undertaken?

[251] The Court of Appeal answered this question by finding that where

jurisdiction and fraud are raised bona fide before the court, *the Malaysian court as the registering court under the REJA would hear the issue de novo*. The reasoning is that an arbitral tribunal's decision on its own jurisdiction is never final, especially when issues of fraud are linked to the issue of jurisdiction. The question that arises is whether such an approach is warranted, given that the confirmation judgment is sought to be registered under the REJA and not the MAA (under the MAA too, it falls to be considered what is meant by a *de novo* hearing. It does not entail a full re-hearing with evidence called etc save in truly exceptional cases).

[252] But returning to the issue at hand, does a *de novo* approach accord with s 5(1)(a)(ii) which relates to the issue of jurisdiction and s 5(1)(a)(iv) which relates to the issue of fraud.

[253] Section 5(1)(a)(ii) and (iv) of the the REJA read as follows:

> *On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment —*
>
> (a) shall be set aside if the registering court is satisfied —
>
> ...
>
> (ii) that the courts of the country of the original court *had no jurisdiction* in the circumstances of the case;
>
> (iii) ...
>
> (iv) *that the judgment was obtained by fraud*; ... (Emphasis added.)

[254] The respondent maintains that the underlying award can be examined because the use of the words '... in the circumstances of the case' is wide enough to cover the underlying award. The definition of judgment is qualified by the opening words 'unless the context otherwise requires' and because the word 'judgment' is defined to 'include' a foreign award, a challenge to jurisdiction can be made against the confirmation judgment as well as to the jurisdiction of the underlying award.

[255] Similarly, it is submitted, fraud can afford a challenge to the underlying award under s 5(1)(a)(iv).

[256] The appellants without directly contradicting this position, maintain that when reference is made to the judgment being obtained by fraud under s 5(1)(a)(iv), it does not refer to the actual factual allegations of fraud relating to whether the disputed transactions took place in relation to the delivery of the marine oil as examined by the arbitral tribunal, but instead relates to *fraud on the foreign arbitral tribunal* or court pronouncing the judgment. The issue of fraud in relation to the factual matrix of the dispute between the parties

involves the merits of a case and accordingly the merits or propriety of the foreign judgment must be taken in the original jurisdiction where the judgment was pronounced, and not in the registering and enforcing courts, here the Malaysian courts.

[257] In short, the appellants maintain that these objections ought to have been taken during the *s 66 UK registration of the award or by setting aside the s 66 UK judgment.*

[258] Secondly, their stance is that the fraud referred to by the respondent in the instant appeal relating to the two disputed transactions of marine gas oils, is *not* fraud directed at the London Tribunal nor a fraud on the English High Court, which is what is required under s 5(1)(a)(iv), and accordingly, s 5(1)(a)(ii). The latter contention of a lack of jurisdiction arising by reason of the fraud in relation to the supply of the oil.

[259] The two objections put forward by the respondent with a view to setting aside the confirmation judgment are intertwined, because it is the respondent's position that as the two disputed transactions are 'fraudulent', there could not have been any 'arbitration agreement' between the parties at all, which in turn meant that the arbitral tribunal had no jurisdiction.

[260] Therefore, the two issues before us relating to jurisdiction and fraud are intertwined. They also relate directly to the heart of the factual dispute between the parties in the course of the arbitration.

[261] The question that then arises is this:

> *Do ss 5(1)(a)(ii) and (iv) of REJA (not the MAA) relate to the actual factual controversy comprising the subject matter of the original dispute between the parties such that the registering court undertakes a complete review of the factual matrix of the case?*
>
> Or is it the case that the court only looks to whether a fraud was perpetrated on the original arbitral tribunal or the registering court with a view to ascertaining whether there was fraud on the court? Was the fraud alleged by the respondent intrinsic or extrinsic?

[262] To reiterate, the Court of Appeal took the position that the issue of fraud had to be examined afresh in its entirety such that a *de novo* approach by the registering court had to be adopted. In doing so, the Court of Appeal read the provisions of the MAA into the REJA, either on the basis of an implied repeal or an interdependent reading of the two, such that the REJA was to be read subject to the MAA. As we have earlier concluded, the Court of Appeal, with respect, erred in so determining.

[263] The appellants maintain that a more detached approach has to be undertaken as the actual findings of fraud by the arbitral tribunal in London ought not to be re-examined *de novo*. The respondent maintains otherwise on the basis that *Dallah* and *Astro* allow for such a passive remedy even under the REJA, and also on the basis that fraud unravels all.

Our analysis

[264] We are broadly in agreement with the approach adopted by the learned *amicus curiae* in relation to this issue. Firstly that *'jurisdiction' in the context of arbitral awards commonly refers to 'the power of the tribunal to hear a case'*. Therefore, where a challenge is predicated on allegations of fraud which impact on the arbitrator's power under the arbitration agreement, this can amount to a jurisdictional challenge. In such an instance the reviewing or registering court may look to whether the arbitral tribunal had the requisite jurisdiction to hear the case. In such cases ie the Model Law or equivalent approach, the reviewing court can look at whether the arbitral tribunal had the requisite jurisdiction to hear the case (see *C v D* [2023] 5 HKC 440; (2023) 26 HKCFAR 216; *BBA and others v BAZ and another appeal* [2020] 2 SLR 453; *BTN and another v BTP and another* [2021] 1 SLR 276; *Republic of Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm)). However, it should also be borne in mind that in these cases, the review was undertaken vide the relevant statutes relating solely to arbitral awards, and not statutes based on reciprocity or comity.

[265] In this context, we reiterate that in view of our earlier conclusion, we are dealing with the REJA and not the MAA here. In keeping with our earlier conclusion that the registering court under the REJA is entitled to review the arbitral award underlying the confirmation judgment, it would follow that the article V defences as set out in s 5 of the REJA enable the registering court to consider the issue of jurisdiction, but again in terms as envisaged under the REJA.

[266] This means that a review would be undertaken only where it is truly a question of whether the arbitral tribunal had the power and jurisdiction to hear the dispute, as opposed to a review of the factual findings of the arbitral tribunal relating to fraud as a part of the factual matrix of the case. In other words, fraud arising from an adjudication on the factual merits of the case ought not to be open to a full review.

Canada

[267] In Canada, the distinction between fraud going to jurisdiction as opposed to fraud in the context of the actual dispute between the opposing

parties was considered by the Canadian Supreme Court in the case of *Beals v Saldanha* 2003 SCC 72 ('Beals') where it identified two types of fraud:

(a) fraud going to jurisdiction; and

(b) fraud going to the merits.

[268] *Where fraud goes to the jurisdiction of the non-Canadian court, this may be raised to challenge the judgment. However, where it goes to the merits, the 'fraud' cannot be reviewed where it was the subject of prior adjudication.* New allegations or new and material facts would have to subsist for such a review to be permissible. The definition of 'new and material facts' are those that a 'defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence'. On the facts of *Beals*, the Supreme Court of Canada held that the defendants' election not to defend a Florida action meant that they were 'barred from attacking the evidence presented to the Florida judge and jury as being fraudulent'.

United States of America

[269] In the United States, which recognises parallel entitlement under its foreign judgments' regime, the broad principle is that the fraud exception only applies to *extrinsic fraud and not intrinsic fraud*. Only extrinsic fraud is sufficient to resist the registering of a foreign judgment.

[270] Extrinsic fraud is 'conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case', such as 'when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of the judgment' (see the 2005 Uniform Foreign-Country Money Judgments Recognition ('UFCMJR') Act, s 4, cmt.7)

[271] *In essence, extrinsic fraud refers to fraud that operates so as to prevent the opposing party of an adequate opportunity to present its case to the court.*

[272] *Intrinsic fraud on the other hand which is not subject to close curial scrutiny is fraud that occurs during the foreign judicial proceeding itself, 'such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding' (2005 UFCMJR Act, s 4 cmt.7).*

[273] Underlying this dichotomy and the limitation that only extrinsic fraud is sufficient to resist the registering of a foreign judgment/arbitral award, is the proposition that where intrinsic fraud has occurred, it should be raised

and dealt with in the rendering court. Parties should raise allegations of fraud in a timely manner rather than waiting until enforcement proceedings in another jurisdiction, given that the rendering court that oversaw the proceedings would be better placed to oversee the proceedings than a foreign court that has no direct knowledge of the proceedings and must rely on the parties' allegations in subsequent enforcement proceedings. The extrinsic/intrinsic test provides a clear approach to be adopted. However as opined by the learned *amicus curiae* it may be problematic in practice as the seemingly clear bright line between the two may be difficult to apply. For example, if parties are aware that only extrinsic fraud matters, it is possible that misconduct might be tailored to stay within the 'intrinsic' fraud category.

Functional test based on materiality

[274] A more functional test focused on materiality and the availability of a remedy in the foreign court in relation to allegations of fraud utilised to set aside the arbitral award, is a preferred test as it takes a wider approach which may be more relevant and appropriate. In *Chevron Corp v Donziger* 974 F Supp 2d 362 (SDNY 2014) the Southern District of New York refused to recognise an Ecuadorian judgment due to extensive fraud and corruption including the bribery of the judge and ghostwriting of the judgment. The court focused on the egregious nature and impact of the fraudulent conduct, utilising a functional approach that prioritised the integrity of the judicial process over the formal distinctions between intrinsic and extrinsic fraud.

The test

[275] Questions that might be asked in relation to an allegation of fraud rendering the judgment unsafe and unregistrable for enforcement might include:

(i) was the fraud likely to have changed the result?

(ii) was there a realistic opportunity to uncover or challenge it in the foreign proceeding?

(iii) is the foreign system capable of addressing this type of fraud? and

(iv) would enforcement contravene Malaysia's public policy sensitivities?

[276] With respect to questions (ii) and (iii) it would follow that given the relationship of reciprocity under the REJA, with its specifically named counterpart countries, these reciprocating countries would be in a position to identify and prevent fraud as envisaged. With respect to (ii), there was a realistic opportunity accorded to challenge the 'fraud' in the UK proceedings both at arbitration and in the s 66 proceedings. And with respect to (iii), the English courts are capable of addressing this form of allegation of fraud.

[277] As for questions (i) and (iv), these are pertinent questions that can be answered by the registering court and would lead to an efficient and fair disposal of the fraud claim, without having to re-examine afresh, proof of the same.

[278] This functional and materiality test works well to enable the registering court to determine whether the judgment ought to be set aside or not.

India

[279] In the Indian Supreme Court case of *Sri Budhia Swain & Ors v Gopinath Deb & Ors* AIR 1999 SC 2089 the court held that when reviewing a judgment held to have been made without jurisdiction 'a distinction has to be drawn between lack of jurisdiction and a mere error in the exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings ...'.

[280] The relevant Indian law on enforcement of foreign awards states in an Explanatory Note, '... for the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if — (i) the making of the award was induced or affected by fraud or corruption'. (see Explanation 1 to s 48(2) of the Arbitration and Conciliation Act 1996 (as amended)). Another Explanatory Note states '... for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute' (see Explanation 2 to s 48(2) of the Arbitration and Conciliation Act 1996 (as amended)).

[281] Therefore, notwithstanding *Dallah*, (which in any event relates to the availability of a passive remedy under the Model Law) and the position taken in the Court of Appeal, this functionality and materiality test or approach allows the registering court to take into account the failure of the losing party to engage with earlier proceedings as being relevant in deciding whether or not to allow the jurisdictional challenge.

[282] In any event even when utilising a Model Law based statute for the enforcement of a foreign arbitral award, ie the MAA here, a finding of fraud is not in itself a ground for setting aside or challenging an award unless the award is in conflict with the public policy of Malaysia or where the making of the award was induced or affected by fraud or corruption (see s 37(2)(a)). What more the case when the arbitral award in the form of a confirmation judgment is sought to be registered and enforced under REJA.

A Singapore

[283] Turning to Singapore, in the Singapore High Court decision of *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2009] SCD 279; [2009] SGHC 231 (HC) the plaintiff filed an application to set aside the arbitral award on the basis that it was procured by fraud and/or in a manner that was contrary to public policy. It was not premised on the reciprocal enforcement of judgments equivalent statute. It was premised on the Singapore International Arbitration Act 1994 and article 34(2)(b)(ii) of the UNCITRAL Model Law. The contention was that the defendant and its key witness had given false testimony before the arbitrator and had suppressed key documents and information in the arbitration in order to perpetuate the false testimony. The application was dismissed and in doing so the court considered what amounted to an arbitral award being obtained by fraud, more particularly perjury and whether a deliberate withholding of documents would be considered akin to fraud. The Singapore High Court held that proving fraud or unconscionable conduct was insufficient. In order to obtain relief, the complainant must show that the reprehensible conduct or fraud had caused it substantial injustice in that the same procured or substantially impacted the making of the award.

[284] This begs the question in the instant case whether the finding of the London Tribunal that rejected the allegations of fraud in relation to the two disputed transactions would be sufficient to establish fraud.

[285] It is submitted for the respondent, relying on *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 (CA) ('Abouloff') that the English courts have for long recognised that fraud vitiates foreign judgments even where it does not relate to jurisdiction or has otherwise been raised in prior foreign proceedings. However, we are unable to accept that the mere allegation of 'fraud', in itself, vitiates a confirmation judgment premised on an arbitral award under the REJA. It requires satisfaction of the test above, and importantly the question as to whether the 'fraud' impacts substantially on the award and the judgment handed down by the supervisory or rendering court in the same jurisdiction.

[286] In the case of *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] SCD 68; [2002] SGCA 17 (CA) the Singapore Court of Appeal did not agree with the rule in *Abouloff* on the basis that it would encourage 'endless litigation' and 'judicial chauvinism'. In *Abouloff* which dates back to 1882, the English Court of Appeal held that a foreign judgment could be impeached for fraud even though no new evidence was produced and even though the fraud might have been, and was alleged in the foreign proceedings. The English Court of Appeal held that a re-opening of the fraud issue was justified on the basis that the foreign court would not have itself approved of being misled nor

permitted such a judgment to remain. However, this was not accepted by the Singapore Court of Appeal which held, inter alia, as follows:

> 27. In our judgment the approach adopted in Abouloff has less to commend itself, as it would only encourage endless litigation. It is of paramount importance that there should be finality. Every losing party understandably would like to litigate the issue over again with the hope that a different tribunal would look at the fact situation differently. But that can never be a good reason for allowing a losing party to reopen issues. To liberally allow a party to do so would be to permit that party to have a second bite at the cherry, an eventuality which is generally abhorred by all civilised systems of law. Of course, we are conscious that the rule against reopening issues is not absolute. There are exceptions but they are subject to safeguards. In England, an issue already adjudicated upon by the domestic courts would not, as a rule be allowed to be re-litigated. There is no logical reason why a different rule should apply in relation to a foreign judgment.

[287] The Singapore Court of Appeal also emphasised that a court of one jurisdiction should be slow to pass judgment on an issue already decided upon by a competent court of another jurisdiction. This echoes the sentiments expressed by the Indian Supreme Court. This, the Singapore Court of Appeal explained, reflected the doctrine of comity. Importantly, the court recognised that two tribunals both acting consciously and diligently could very well come to a different conclusion on the same facts. There was no question of which was more correct. To attempt to do so it was said would be 'an invidious exercise and could lead to the undesirable consequence which we have mentioned before of encouraging judicial chauvinism. It must be borne in mind that the enforcement forum is not an appellate tribunal vis a vis the foreign judgment'.

[288] And there we have the nub of the entire exercise. *The enforcing court under the REJA is not an appellate court. It is an enforcing court with limited bases to review the judgment sought to be enforced, as spelt out under s 5.*

[289] Ultimately therefore, under the provisions of the REJA, more particularly s 5(1)(a)(ii) and (iv), the approach of the court *is not to undertake a de novo re-hearing of the evidence that was undertaken before the arbitral tribunal relating to the allegations of fraud afresh, for the purposes of a jurisdictional challenge*. This is all the more so where such findings were scrutinised by the supervisory court under s 66 of the English Arbitration Act 1996.

[290] Equally, whether one applies the intrinsic/extrinsic test in relation to fraud, or fraud going to the jurisdiction or fraud on the merits test, or the functional and materiality test, on the facts of the instant appeal, it follows that the proper approach for the court in exercising its powers under s 5 of the REJA

to take is to consider the evidence already before it on record, and determine whether:

(a) such records point to a jurisdictional issue such that it can be safely concluded that the arbitral tribunal had no jurisdiction to hear the matter; or

(b) it is a finding on the merits of the case which does not go to jurisdiction.

[291] The point to be made for the purposes of this appeal is that the exercise does not warrant the High Court embarking on a full *de novo* hearing, including cross-examination of witnesses, to determine whether the two disputed documents are fraudulent or otherwise. That would amount to a re-hearing of the evidential findings of the arbitral tribunal which is not the correct approach to be undertaken.

[292] If the position was that there was some fraud perpetrated on the court, that might allow for some new and material evidence to be elicited to establish the fraud and the jurisdictional point. But this would require evidence that is strong and clear. Even findings of perjury during the course of the arbitral hearing have been found to be insufficient to set aside an award. That is not the case here.

The precise issues sought to be re-examined in the enforcing court which were determined by the london tribunal and endorsed by the s 66(1) UK judgment under the English Arbitration Act 1996

[293] The respondent seeks to have heard afresh several issues relating to fraud which it maintains go towards the jurisdiction of the arbitral tribunal. The appellants allege otherwise. What cannot be disputed however is that the arbitral tribunal considered each of these issues in turn in detail and gave reasons as to why they were dismissed on their merits. It is these very issues that the respondent seeks to have reviewed afresh in the enforcing court under the REJA by way of a full *de novo* hearing. We reproduce in summary form the issues sought to be raised and the determination of the arbitration tribunal to enable a consideration of the extent of scrutiny warranted in a case such as the present. Further it also enables a consideration of whether the issues raised are essentially factual matters going to the findings of the tribunal with a view to overturning or reversing these findings, or whether they go to the root of the claim relating to jurisdiction.

[294] Where the attack is on the findings comprising the subject matter of the claim, then the issue is whether the reviewing court is expected to act as a form of appellate court sitting in judgment to determine whether the arbitral tribunal got it right or wrong. Where the subject matter goes to the root of the

claim such that it is not permissible to even consider the claim from the outset, then that would be a matter that goes to jurisdiction.

[295] We now turn to the specific allegations.

[296] The issues of fraud going towards the jurisdiction of the arbitral tribunal and the tribunal's findings on the same are set out in summary form. We have adopted the appellants' summary from their submissions in Annexure D as this neatly sets out the key points in contention and which comprise the basis for the respondent's defence in relation to their setting aside application under the REJA.

Issue (a): Whether there was in fact a contract between the parties which incorporates the OWB terms and the arbitration agreement contained within it; and

Issue (b): Whether there was an actual sale and delivery of MGO from the second appellant to the respondent

[297] The London Tribunal was satisfied that there were two contracts for delivery of the marine gas oil made orally by telephone or electronic message on the relevant dates. Detailed reasons were given for that conclusion including the available correspondence, oral evidence, where the tribunal took into account the fact that witnesses were unable to recall in any detail two contracts out of numerous contracts for bunker oils that had proceeded between the parties; the fact that trader conversations were not generally kept for longer than three months, that it was part of ordinary practice to conclude business on the phone given the numerous number of transactions undertaken at any one time. It was concluded that the transactions did take place.

[298] Contemporaneous documents 'firmly indicated' that supply contracts had been concluded and the respondent had authorised substantial payments against invoices in respect of each transaction. To that extent there was no failure to comply with the OWB terms.

[299] As for the actual supply of these marine gas oils the late issue of a sales order confirmation did not negate the existence of a contract of supply to a vessel. There was oral evidence to support this.

[300] The tribunal concluded based on all the available evidence and the lack of probability of the respondent's case that the marine gas oils were in fact physically delivered to the relevant vessels. Any limitations or inaccuracies in the information provided by the Bunker Receiving Reports ('BRRs') were not such as to invalidate the transactions or prevent them from operating as sales.

They constituted prima facie evidence that the oils had in fact been supplied. These BRRs were signed and stamped by officers on board the vessels who acted on the respondent's instructions. And finally, that even if this conclusion was incorrect, the respondent was estopped from denying such delivery as it was responsible for the information on the BRRs.

[301] There is far more evidential material on which the London tribunal arrived at its decision which we do not propose to reproduce here. Sufficient to say that the tribunal undertook a detailed analysis of the evidence to arrive at its conclusion. Reasons have been meticulously set out.

Issue (c): The appellants relied on documents that were not genuine and/or forged and/or fabricated in the London arbitration

[302] This relates directly to the issue of the genuineness of the BRRs. The tribunal inferred that because the second appellant was the only party not involved in the physical operations, the information recorded as to the location of delivery on the documentation that was generated by the second appellant was supplied to it by either the respondent or Straits Energy. Each of the BRRs relating to the disputed supplies was produced under the respondent's instructions. The tribunal was not satisfied that the evidence suggests that the signatures or the stamps were forged or falsely issued or that the documents were otherwise false. The evidence fell far short of this and was insufficient to support the respondent's allegations of false or forged documents. Similarly, there was insufficient evidence to justify a conclusion that the officers of the various vessels had issued and/or signed or stamped false or forged documents on repeated occasions falsely.

Issue (d): Whether the set off agreement applied to the 'transaction agreements'

[303] Here the respondent objected to the jurisdiction of the London tribunal on the grounds that the arbitration agreement in the set off agreement applied to both that agreement and the 'transaction agreements' (ie the marine oil gas supply documents).

[304] The tribunal concluded that the respondent was precluded from raising a new defence for the first time some two years after the commencement of the arbitration and after the exchange of pleadings, documents, submissions and after the issuance of an interim award on jurisdiction. This contention was viewed as a 'new argument' rather than as new evidence, and could have been raised much earlier. Reliance was placed on s 73 of the UK Arbitration Act 1996 which makes it clear that any new objection may not be raised at a later stage unless the party relying on it could show that it could not reasonably have been discovered earlier.

[305] Nonetheless, the tribunal did consider this issue on its merits as it was fully argued. It found that the set off agreement was not worded with a view to overriding either party's standard terms and conditions of supply and cl 11.2 expressly provided that it would only prevail over any other agreement where it was 'in conflict'. On its express wording the set off agreement was not designed to override the general terms of both sides and in relation to the dispute there was no inconsistency between the set off agreement and OWB's terms and accordingly the latter prevailed. The set off agreement was not applicable so as to displace the OWB Terms.

What then is the appropriate approach to be undertaken by the registering and enforcing court under the REJA?

[306] The available approaches or options when considering a review of the foregoing issues under the REJA, more particularly s 5(1)(a)(ii) and (iv) are:

(a) a full review by way of re-hearing with evidence and witnesses being allowed; and

(b) limited curial review.

[307] As we have pointed out earlier on in the judgment, the full review by way of a *de novo* hearing is not the correct approach given the nature of the objections raised in relation to jurisdiction as well as the need for finality. It is evident from a perusal of the objections made that many if not most of the allegations relate to evidential matters or legal conclusions arrived at on the basis of the evidence presented to the tribunal. In short, they are matters intrinsic to the adjudication process undertaken by the arbitral tribunal. They are essentially matters of evidence which require determination by the tribunal in relation to the validity of the claim itself, as opposed to pure matters of law which strike at the arbitrators' powers and jurisdiction to hear and adjudicate on the matter.

[308] The courts should be slow to encourage a full-blown rehearing which would effectively amount to a second bite of the cherry in relation to some of the issues raised. Where the issues relate to the construction of contracts, no oral evidence is warranted.

[309] The second option of a limited curial review allows for the respondent to present its case without the need for a full rehearing of the matter. What then does this involve? While there is scant material on this point relating to the REJA, the approaches on minimal curial review in relation to the equivalent of the MAA are plentiful throughout the Commonwealth jurisdiction. Sufficient to say that with some modification, these approaches warrant adoption with adaptation to meet the jurisprudence of this state.

[310] In the Indian Supreme Court case of *Vijay Karia v Prysmian Cavi E Sistemi Sri* AIR 2020 SC 1807 ('Vijay Karia') referred to us by the learned *amicus curiae* endorses the minimal curial review approach (see para 65 of the judgment):

> (a) The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision on matters not submitted or argued before him.
>
> (b) Fairness, however is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.
>
> (c) Indeed, the latter conception of fairness justifies a policy of minimal curial intervention, which has become common as a matter of international practice.

[311] Such a minimal curial review approach is also endorsed in Singapore's *AJT v AJU* [2011] SGCA 41 and in the Privy Council decision (Mauritius appeal) in *Betamax Ltd v State Trading Corp (Mauritius)* [2021] All ER (D) 77 (Jun) ('Betamax'). The fuller contextual curial approach was not followed in *Betamax*.

[312] The approaches in these cases give primacy to the autonomy of arbitral proceedings, as well as upholding the primacy of arbitral awards. Such an approach is indeed consonant and consistent with the registration and enforcement of a confirmation judgment premised on an arbitral award, where such tenets comprise the core of reciprocity as well. If anything, even more so, as the REJA cements the concept of comity and reciprocity in the form of statute, allowing for the expeditious registration of judgments (including arbitral awards) while maintaining the perennial importance of finality.

[313] Another important aspect of the approach to be undertaken by the registering court in relation to curial review is the importance of not turning the exercise into an appellate review of the tribunal's decision. This is borne out by the case of *Ssangyong Engineering v National Highways Authority* AIR 2019 SC 5041:

> ... it must be clearly understood that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.

[314] While it may be said that we are not dealing with public policy under the Model Law here, the foregoing still remains a highly relevant factor to be considered by the enforcing court when undertaking the curial review of an arbitral award, albeit in the form of a confirmation judgment under the REJA. In point of fact, more so. Given the strict categories available under the REJA, the purpose of the defences set out in s 5 that require curial review, do not allow for a roving scrutiny and re-analysis of factual matters relating to fraud, as would be undertaken by an appellate court. That is not the approach to be undertaken by the registering and enforcing court under the REJA.

[315] We also accept with respect, the observations of the learned *amicus curiae* on the benefits of a minimal curial review approach. The advantages include increased certainty as well as respect of the autonomy of foreign judicial and/or arbitral process.

[316] If the *de novo* or re-hearing process is preferred it could not then be limited to questions of fact but also of law. In *Betamax* if the court had decided to re-hear the allegations, it would have had to deal with whether the contract of affreightment made was in breach of Mauritian public procurement laws. That is not the intent or purpose of s 5 of the REJA, which mirrors the article V defences available under the New York Convention. Similarly in the instant case apart from a re-hearing *de novo* on issues of 'fraud' the reviewing court would effectively be determining a question of law as to whether the arbitration clause in the set off agreement should prevail over that in the OWB terms and conditions under the marine oil gas supply contracts. This amounts to a review of the decision of the arbitral tribunal through the back door. This is not a tenable approach to endorse.

[317] Finally, a *de novo* approach makes a disproportionate attack on the principle of finality.

[318] In conclusion a minimal curial review of the foreign judgment is consistent with the ethos and philosophy of the REJA which is based on reciprocity. With respect to matters of jurisdiction, such as a lack of jurisdiction by reason of fraud (as is the case in the instant appeal) it is best to adopt the functional and materiality test to ascertain on the information available on record whether the fraud was material, and whether remedies were available at the foreign arbitral tribunal as well as the seat court, to determine whether this is, indeed, a true jurisdictional challenge.

[319] The *de novo* approach should be an exception rather than the rule.

[320] Therefore, the decision of the Court of Appeal allowing the respondent's application for trial identifying *four 'potential issues' requiring a*

trial prior to the determination of the setting aside application ('application for trial') is set aside and the application for setting aside is to proceed without any such trial.

[321] We now turn to answer the questions of law:

(1) In a case where a superior court of a reciprocating country listed under the First Schedule of the Reciprocal Enforcement of Judgments Act 1958 (' the REJA') has entered judgment by way of an enforcement of an arbitral award ('foreign judgment'), where the judgment creditor seeks to register and enforce the foreign judgment under the REJA:

(a) whether the Malaysian Court can resort to ordering a trial of issue or issues between the judgment creditor and the judgment debtor under O 67 r 9(2) of the Rules of Court 2012 ('the ROC') where those issues had been tried in the arbitration and determined in the award issued: *Answer: no, as explained in paras 306 onwards of our judgment*;

(b) whether a Malaysian court hearing an application under the REJA may exercise the powers and jurisdiction of a court hearing a matter under ss 37 to 39 of the Arbitration Act 2005:
Answer: no;

(c) in the event that the answer to either of the above questions 1(a) or (b) is in the affirmative:

(i) having regard to the Court of Appeal case of *Mann Holdings Pte Ltd & Anor v Ung Yoke Hong* [2019] MLJU 101; [2019] 6 CLJ 475 (CA), whether the Malaysian Court, sitting in such a trial of issue or issues between the judgment creditor and the judgment debtor, is entitled to reopen the merits or the propriety of the arbitral award upon which the foreign judgment was already entered, including the jurisdiction of the arbitral tribunal;
Answer: as questions 1(a) and (b) were not answered in the affirmative, there is no need to answer question 1(c)(i); and

(ii) having regard to the Supreme Court case of *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107; [1985] 1 LNS 131, what are the criteria or factors to be considered by a Malaysian Court before the court can order a trial of issue or issues under Or 67 r 9(2) of the ROC.
Answer: as questions 1(a) and (b) were not answered in the affirmative, there is no need to answer question 1(c)(ii).

[322] The appeal is allowed and the judgment of the Court of Appeal set aside.

Appeal allowed; and COA's decision set aside.

Reported by Ashok Kumar